

1 [The R.M.C. 803 session was called to order at 1414, 5 December  
2 2007.]

3 MJ: Trial Counsel.

4 PROS: Yes, Your Honor. Good afternoon.

5 MJ: Good afternoon. I see that you and Commander Stone are  
6 here and that a new member has joined the trial team-- prosecution.

7 PROS: Yes, sir. At this time he will announce his  
8 qualifications to the court.

9 MJ: Thank you.

10 CTC [Mr. Murphy]: Good morning, excuse me, good morning, Your  
11 Honor. My name is John Murphy. I have been detailed to this  
12 military commission by the chief prosecutor. I am qualified to serve  
13 under R.M.C. 503 and I have previously been sworn in accordance with  
14 R.M.C. 807. I have not acted in any manner that might tend to  
15 disqualify me in these proceedings. I am an Assistant United States  
16 Attorney currently assigned to the national security division of the  
17 United States Department of Justice.

18 MJ: Very good. Thank you.

19 CTC [Mr. Murphy]: Thank you, Your Honor.

20 MJ: Anyone else new on the defense [sic] team you'd like to----

21 PROS: No, sir. I think this is the same group which you recall  
22 from the last time.

23 MJ: Outstanding.

1           PROS: Yes, sir.

2           MJ: We have had some changes to the defense team. Mr. Swift.

3           CDC [Mr. Swift]: Yes, Your Honor, but before proceeding I need  
4 to alert the court. Are we now getting a translation? We have  
5 received no translation yet over the IR system, sir, and the Sergeant  
6 McDonald informed us whether we were receiving anything.

7           MJ: Okay. We have a problem with the translation equipment.

8           COURT INTERPRETER: Hello.

9           MJ: Okay. I do hear the interpreter speaking in English over  
10 the microphone.

11          COURT INTERPRETER: Yes.

12          MJ: And your voice is being broadcast throughout the courtroom,  
13 but apparently Mr. Hamdan cannot hear you through his headset when  
14 you speak in Arabic.

15          COURT INTERPRETER: Oh. Hello.

16          MJ: Yes, we're here.

17          COURT INTERPRETER: You're still here.

18          MJ: Would you speak to Mr. Hamdan in Arabic and see if his  
19 headset is working now?

20          COURT INTERPRETER: **[Speaks in Arabic.]**

21          MJ: I can hear your voice being broadcast over a speaker that's  
22 in the courtroom.

23          COURT INTERPRETER: Yes.

1 MJ: And it also appears that Mr. Hamdan can hear it through his  
2 headset. Is that what's happening?

3 CDC [Mr. Swift]: Right, Your Honor, but what he says is that  
4 your voice comes in over the other one.

5 MJ: You can hear both voices in your headset? Okay. Well, I  
6 apologize for this. We can't get much business done if our headsets  
7 are not working.

8 Mr. Swift, though we did discuss I guess beforehand the  
9 possibility of having your defense interpreter sit beside Mr. Hamdan  
10 and render the proceedings into Arabic----

11 CDC [Mr. Swift]: Two points your----

12 MJ: ----without using the electronic system.

13 CDC [Mr. Swift]: One, that would be in violation since he's not  
14 qualified or he hasn't been by the convening authority detailed to be  
15 the official court interpreter. Moreover, in speaking with my  
16 interpreter and as he has indicated to this court, he is qualified in  
17 interpretation, not simultaneous but sequential and this requires  
18 simultaneous interpretation.

19 MJ: Okay. I guess the only thing that we can do then is recess  
20 and give the people who run the technology a little bit of time to  
21 work through this. Does either party see any better idea than that?  
22 I apologize to everyone for the inconvenience and I'll recess the

1 court until I'm informed that the translation equipment is working.

2 Thank you.

3 **[The R.M.C. 803 session recessed at 1418, 5 December 2007.]**

4 **[The R.M.C. 803 session was called to order at 1543, 5 December**  
5 **2007.]**

6 MJ: Please be seated.

7 PROS: Your Honor, all the parties are present that were present  
8 when we last recessed.

9 MJ: Thank you. Well, I've been told that the sound system has  
10 been fixed and that Mr. Hamdan should be able to listen now to the  
11 interpretation in his native language.

12 Is that so Mr. Hamdan?

13 **[The accused nodded in the affirmative.]**

14 MJ: Good. I get the affirmative nod and a smile from the  
15 accused. It seems like we are in good shape then.

16 Mr. Swift, you were about to announce your legal status and  
17 qualifications as to oath in your new capacity as a civilian  
18 attorney.

19 CDC [Mr. Swift]: Yes, Your Honor. I'm licensed to practice in  
20 the state--before the Supreme Court of the state of North Carolina.  
21 I am qualified in accordance with R.M.C. 502d. I have provided my  
22 notice of appearance and agreement to the military judge and it is  
23 marked as Appellate Exhibit 40, as required by the Military

1 Commissions Act. I have not acted in any manner that might tend to  
2 disqualify me, and I have been previously sworn in my capacity as a  
3 civilian counsel, pursuant to Rule for Military Commission 807.

4 MJ: Very good.

5 CDC [Mr. Swift]: Joining me also is Mr. Schneider, who will  
6 announce his qualifications to the court.

7 MJ: Mr. Schneider, welcome to the case.

8 CDC [Mr. Schneider]: Good afternoon, Your Honor, thank you. My  
9 name is Harry H. Schneider Jr., and I am licensed to practice before  
10 the state courts in the state of Washington and the United States  
11 District Court for the Western District of Washington, 9th Circuit  
12 and Supreme Court. I am qualified in accordance with R.M.C. 502d,  
13 and have been approved by chief defense counsel as a member of the  
14 pool of qualified defense counsel, and I have been sworn by the chief  
15 defense counsel.

16 I have provided my notice of appearance in agreement to the  
17 military judge in June and it was marked at that time as AE 40, as  
18 required by the Military Commissions Act. I have not acted in any  
19 manner that might tend to disqualify me in this matter--this  
20 proceeding, and I have been retained at no cost to the government.

21 MJ: Very good.

22 CDC [Mr. Schneider]: And sworn.

1 MJ: And you are sworn as a civilian counsel. Outstanding.  
2 Almost obscured by the pillar is yet another new member of the  
3 defense team.

4 DC: Good afternoon, Your Honor. I am Lieutenant Brian Mizer; I  
5 am a member of the Nebraska state bar. I have been detailed to this  
6 military commission by the chief defense counsel. I am qualified  
7 under Rule for Court-Martial 503, and I've previously been sworn in  
8 accordance with R.M.C. 807. I have not acted in any manner that  
9 might tend to disqualify me in this proceeding. The document  
10 detailing me as counsel or the detailing letter is marked as  
11 Appellate Exhibit 37, Your Honor.

12 Thank you.

13 MJ: Very good. The court reporter detailed to this session of  
14 the trial has previously been sworn and is the same reporter who  
15 appeared at our last session.

16 On the 4th of June of this year this commission dismissed  
17 the charges against the accused without prejudice. The dismissal was  
18 based upon the court's determination that the government had not  
19 shown by a preponderance of the evidence that this accused is an  
20 unlawful enemy combatant subject to the jurisdiction of this court.  
21 In litigating the motion, the government relied upon the theory that  
22 a 2002 presidential determination and a 2004 CSRT finding together  
23 showed that the accused was an unlawful enemy combatant. This court

1 rejected that argument, but did not rule conclusively that there is  
2 no jurisdiction over the accused.

3           Thereafter, the government filed a motion to reconsider  
4 offering to introduce evidence from which the court could determine  
5 for itself whether the accused was or was not an unlawful enemy  
6 combatant subject to the jurisdiction of the court. The court  
7 permitted both parties to submit supplemental briefings, and in light  
8 of the decision of the court of military commission review in the  
9 case of *United States versus Omar Khadr*. The court has read and  
10 considered these supplemental briefings and ultimately granted the  
11 government's motion to reconsider in part and denied it in part.

12           Specifically, to the extent the motion seeks to reargue, or  
13 re-litigate the issues resolved against the government on the 4th of  
14 June, the motion for reconsideration is denied. To the extent the  
15 motion seeks to introduce evidence of the accused's activities in  
16 Afghanistan and elsewhere from which the court may determine whether  
17 or not he is subject to the jurisdiction of this court, the motion  
18 was granted.

19           The court has excluded the time between the 4th of June and  
20 today's date from the R.C.M. 707b requirement that the accused be  
21 brought to trial within a 120 days of service of charges.

22           Does either party disagree with this allocation of time?

23           PROS: No, Your Honor.

1 CDC [Mr. Swift]: No, Your Honor.

2 MJ: Very well. This afternoon before coming into the courtroom  
3 I held an 802 conference with the parties at which we discussed some  
4 administrative matters. Summarizing generally, I discussed with the  
5 counsel a phone call that occurred between myself and the senior  
6 prosecutor last week which gave me reason to believe there was a 505  
7 issue pending and I reported to them that I had not responded to that  
8 call. We discussed the requirements of rule of evidence 505  
9 generally, and an issue under that rule was raised by the government  
10 and resolved with the agreement of the parties.

11 We discussed generally the order of motions and witnesses  
12 that we'll follow in conducting this hearing and we discussed  
13 protective orders which remain in place after our last session. We  
14 left that matter with the agreement that counsel will discuss the  
15 existing protective order and propose any changes they may think are  
16 required under the circumstances. Do counsel concur with my summary  
17 of the 802 conference or wish to supplement it in any way?

18 PROS: No, sir, not from the government.

19 CDC [Mr. Swift]: I concur, but I would like to address one  
20 matter to the court.

21 MJ: Please.

22 DC: If I may. Sir, one of the issues raised inside the 802 was  
23 the issue of FOUO, For Official Use Only, and law enforcement



1 sensitive documents that have been so marked under the protective  
2 order which would be protected from disclosure. Many of these  
3 documents are concerned in the motions that we are going to talk  
4 about today and the evidence that's going to be put on today. So  
5 that the defense does not violate the protective order and state our  
6 understanding right now is under the protective order anytime we were  
7 to talk about a FOUO document, for official use only, or a law  
8 enforcement document we will have to close the courtroom because it  
9 can't be for general production under the protective order. We can't  
10 put that out to the public, this is a public hearing.

11 We talked to the prosecution whether for the purpose of--  
12 you're well aware of all the documents that we have in this capacity--  
13 -whether that part of the protective order could now be waived and  
14 that those documents could be discussed in open court or not. At the  
15 date of this hearing, we have not heard back from them.

16 So in probably out of an abundance of caution, but not to  
17 violate the protective order we just want to know what the position  
18 is, whether those documents can now be produced in open court or  
19 whether they must--we must ask for closed sessions when we're using  
20 them.

21 MJ: Thank you. I'll invite the government to respond.

22 PROS: Yes, sir. Lieutenant Colonel Britt for the prosecution.  
23 Your Honor, at the previous session I think, Your Honor, will recall

1 that this same issue was raised and at that time I believe we all  
2 agreed amongst ourselves that that provision of the protective order  
3 which now governs our proceeding would not be waived, but we would  
4 simply agree that documents that were marked FOUO or LES would be  
5 admissible for purposes of this proceeding.

6 MJ: Fair enough.

7 CDC [Mr. Swift]: And admissible in open court?

8 PROS: In open court.

9 CDC [Mr. Swift]: Okay.

10 MJ: Okay. Well we resolved that issue then. The protective  
11 orders of which the court is aware are marked as Appellate Exhibits  
12 18, 19, and 20.

13 PROS: That's correct.

14 MJ: And we agree with the exception of the matter we just  
15 discussed, those remain in force. Several motions have been filed  
16 with the court, and I believe we are prepared to turn our attention  
17 to the motions. The first--good morning, sir.

18 CDC [Mr. McMillan]: Sorry, Your Honor, I assumed you were  
19 asking for the party and all those motions but----

20 MJ: Well, are you going to argue the Article 5 motion?

21 ADC [Mr. McMillan]: I am, sir.

22 MJ: Why don't you step up to the podium and let me just talk to  
23 you for a moment.

1   **[The civilian defense counsel, Mr. McMillan, moved to the podium.]**

2           MJ:   Do you want to argue the entire motion or respond to  
3   questions?

4           CDC [Mr. McMillan]:   I think I'd be very happy to respond to  
5   questions I believe on papers.

6           MJ:   Let me ask you the questions that are foremost on my mind,  
7   and if you have something afterwards that you want to argue that I  
8   haven't given attention to, I will give you the opportunity to do  
9   that.

10                  First, I guess I would like you to describe for me how the  
11   Article 5 hearing that you are requesting would differ from the  
12   proceeding that we already anticipate today.   In other words,  
13   presentation of evidence about whether or not the accused is an  
14   unlawful enemy combatant seems like the same thing that would be  
15   required to determine whether or not he is entitled to prisoner of  
16   war status.

17           CDC [Mr. McMillan]:   Your Honor, I have a number of PowerPoint  
18   slides that would assist me in answering that question and perhaps  
19   some others.

20           MJ:   Okay.

21           CDC [Mr. McMillan]:   I am hoping that I may show them to you and  
22   then with your permission publish them to the court.   They consist of  
23   six slides, none of them are evidence, each of them contain excerpts

1 from the Geneva Conventions or from the M.C.A. Two of them contain  
2 actually excerpts from your order of June 4.

3 MJ: Okay. Why don't you go ahead? As long as these are just  
4 used to supplement your argument, feel free to-- we'll publish those  
5 to whoever might be watching the monitors, and you can go through  
6 your argument.

7 CDC [Mr. McMillan]: Your question was in what way would an  
8 Article 5 hearing supplement or differ from the inquiry that is in  
9 front of the court under the Military Commissions Act. The Military  
10 Commissions Act sets out criteria for unlawful enemy combatants which  
11 exclude from the jurisdiction of this court lawful enemy combatants.  
12 The M.C.A. defines lawful enemy combatants in section 948a(2) which  
13 is the subpart that I have projected to Your Honor at this point. I  
14 request permission to publish to the court.

15 MJ: Please do.

16 CDC [Mr. McMillan]: I believe that it is an operation from the  
17 court reporter.

18 MJ: I think what he is asking to do is put these on the  
19 overhead screens for everyone to see.

20 **[The court reporter published the document as requested.]**

21 CDC [Mr. McMillan]: This section of the statute is my  
22 paraphrase, it is not verbatim, but it sets out the three criteria  
23 under the Military Commissions Act whereby an individual may attain

1 lawful enemy combatant status. These three criteria track the first  
2 three criteria set forth in Article 4 of the Geneva Convention for  
3 POW status.

4 Article 4 of the Geneva Convention contains three  
5 additional criteria that are not mentioned in the M.C.A. as criteria  
6 for lawful enemy combatant status. On the screen now, Your Honor,  
7 are the three additional criteria set forth under Article 4 of the  
8 third Geneva Convention relative to the treatment of prisoners of  
9 war. Again this is my paraphrase of the provisions of Article 4  
10 subparts 4, 5, and 6.

11 Our motion, Your Honor, asks that the proceedings, which  
12 are to be held this week be augmented to include an inquiry into the  
13 three subparts under the Article 4 of the Geneva Convention that are  
14 on the screen here. What this will allow the court to do is to  
15 assess whether or not Mr. Hamdan may be entitled to prisoner of war  
16 status under the third Geneva Convention, and it is our intention  
17 that prisoner of war status is directly material to whether or not  
18 this commission has jurisdiction to proceed over Mr. Hamdan.

19 In fact, it is our belief, Your Honor, that this court's  
20 ruling on June 4th already implicitly addressed the issue and the  
21 slide before you, Your Honor, now is a quote from the June 4th order  
22 of this court indicating as stated there, "There being doubt as to  
23 the accused's status under the law of war, he may not be tried by a

1 military commission until his status is determined by a competent  
2 tribunal." That language tracks the language of the Fifth Article of  
3 the Geneva Convention. Article 5 from the Geneva Convention which is  
4 displayed in this slide indicates that should any doubt arise as to  
5 whether or not an individual is entitled to POW status, such persons  
6 shall enjoy the protection of the present convention until such time  
7 as their status has been determined by a competent tribunal.

8           One of the protections that is afforded to prisoners of war  
9 is that if they are to be tried for criminal offenses, they must be  
10 tried in the same courts according to the same procedures as members  
11 of the Armed Forces of the detained power. This commission does not  
12 have jurisdiction over the members of the U.S. armed forces. They  
13 would not be tried by a military commission, if they were facing  
14 similar charges, they would be tried by a court-martial.

15           Accordingly, it is the defense's position that at present  
16 time Mr. Hamdan enjoys presumptive POW status under Article 5 and  
17 this commission would not have jurisdiction to proceed unless it sits  
18 as a competent tribunal to conduct any inquiry into whether or not  
19 Mr. Hamdan is a member of any of the categories listed under Article  
20 4.

21           MJ: Okay. I understand that you have conceded that this court  
22 is a competent tribunal to make that determination.

23           CDC [Mr. McMillan]: That is correct, sir.

1 MJ: So, the issue that remains is whether or not--I think the  
2 government argues not--the Geneva Conventions apply to your client.  
3 Do you want to address that argument while you are up?

4 CDC [Mr. McMillan]: Yes, sir. The defense maintains that the  
5 Geneva Conventions do apply because Mr. Hamdan was apprehended in the  
6 midst of an international armed conflict. The conflict in  
7 Afghanistan in which Mr. Hamdan was captured involved two high  
8 contracting parties to the Third Geneva Convention, namely the United  
9 States of America and the government of Afghanistan which at the  
10 relevant period involved 2001 was the Taliban. In the context of  
11 that--both parties are signatories--in the context of that  
12 international armed conflict the Geneva Conventions are applicable.

13 The government may come forward to argue that the  
14 Conventions do not apply. They have in their response argued that  
15 the determination of the President in February of 2002 that no  
16 members of al Qaeda could receive POW protections is dispositive on  
17 this motion. We contend that that position was refuted by the Court  
18 of Military Commissions Review in the *Khadr* decision and, if I may  
19 switch to the ELMO and project a few passages from the *Khadr* decision  
20 that may assist in illustrating that point.

21 The projector doesn't appear to be working, but let me read  
22 the passage from the *Khadr* decision. The CMCR indicated, "Congress  
23 never stated that mere membership in or affiliation with the Taliban,

1 al Qaeda or associated forces was a sufficient basis for declaring  
2 someone to be an unlawful enemy combatant for purposes of exercising  
3 criminal jurisdiction over that person."

4           Indeed the CMCR went on to say that in fact summary  
5 determinations of a group's unlawful combatant status would appear to  
6 violate the Supreme Court's ruling in *Hamdan v. Rumsfeld* which  
7 recognized a fundamental right to notice an opportunity to be heard  
8 on matters affecting an enemy combatant status determination.  
9 Essentially, the CMCR is saying here that group determinations are  
10 not adequate and there needs to be an individual assessment of  
11 whether or not individual's fall within any of the category  
12 protective persons under the GPW.

13           So, of course, Mr. Hamdan denies membership in al Qaeda as  
14 well, and if invading the solemn obligations of the Third Geneva  
15 Convention were as easy as simply asserting membership a disputed  
16 allegation, then protections afforded by the Convention would be  
17 utterly elusive. These are of course protections that are paramount  
18 importance to the armed forces of the United States and to our men  
19 and women in uniform, and it is incumbent upon us to make sure that  
20 this nation upholds those protections and promotes them rather than  
21 do anything to allow others to derogate from them.



1 MJ: You agree that if it were clear that your client were a  
2 member of al Qaeda that the Geneva Conventions would not apply to  
3 him?

4 CDC [Mr. McMillan]: I do not agree and----

5 MJ: You believe that they do apply, not only to members of the  
6 Taliban, but to everyone engaging in hostilities for combat within  
7 Afghanistan?

8 CDC [Mr. McMillan]: I believe that an assessment would need to  
9 be made on an individual basis concerning the activities of the  
10 individual who was facing a criminal charge as to whether or not that  
11 person was a protected person and that assessment would be driven by  
12 an inquiry into his conduct and his activities, his membership in  
13 particular groups, for example: armed forces, militias or accompany  
14 or belong to the armed forces; civilians who, while not being members  
15 of the armed forces themselves provide civilian support or labor  
16 support with the authorization of the armed forces. Essentially, a  
17 fact specific inquiry key to each one of the six subparts of Article  
18 4 would be required, and mere group designation wholesale exclusion  
19 is not consistent with the spirit or the letter of the Geneva  
20 Conventions.

21 There is a way in which al Qaeda members could receive the  
22 protections of the Third Geneva Convention, if the facts were to show  
23 that on the ground in Afghanistan they were operating as a militia or

1 volunteer corps belonging to a state party to the convention, and  
2 they conformed with the four criteria set out in GPW(2): being under  
3 a responsible command, wearing insignia visible at a distance,  
4 carrying arms openly, and abiding by the laws and customs of war.

5 The defense is prepared this week to put on testimony concerning al  
6 Qaeda operations that will be relevant to allow the court to make an  
7 assessment of whether or not those sorts of criteria will be met.

8 MJ: The President's group determination that you're referring  
9 to, and the one I believe that the court was referring to in footnote  
10 20 here was the determination not that any particular individual was  
11 a member of al Qaeda, but a determination that Geneva Conventions do  
12 not apply to al Qaeda; is that right?

13 CDC [Mr. McMillan]: That is correct.

14 MJ: And your argument is that that presidential determination  
15 was not correct?

16 CDC [Mr. McMillan]: My argument is that the government's  
17 reliance on that determination is not dispositive of whether or not  
18 Mr. Hamdan may be entitled to Geneva Conventions protections, even if  
19 the government's evidence--and in response to your question--even if  
20 the government's evidence were to show that he was affiliated with al  
21 Qaeda there are ways in which certain activities could entitle  
22 individuals affiliated with al Qaeda to receive Geneva Conventions  
23 protection.

1           There needs to be, of course, a very rigorous examination  
2 of the facts to determine whether or not any of the six subparts of  
3 Article 4 apply. But it is the defense position that Mr. Hamdan's  
4 entitled to that factual inquiry, and in our motion is not prejudging  
5 its outcome, it is asking for only what is required under Article 5  
6 which is that a competent tribunal make that inquiry. It seems  
7 consistent with judicial economy without inquiry to be joined to the  
8 one for which we came down here which is after all an inquiry into  
9 the first three of the six subparts of Article 4 of the GPW.

10       MJ: So you will be satisfied if you're allowed to put on  
11 evidence that he may have been a civilian authorized to accompany the  
12 armed forces or something; that he may have met one of those last  
13 three criteria.

14       CDC [Mr. McMillan]: One of those last three criteria which are  
15 on the screen in front of you right now, Your Honor. For example,  
16 was Mr. Hamdan a person authorized to accompany the armed forces,  
17 including a civilian support unit of one type or another? Again that  
18 is my paraphrase of subpart 4. We would be satisfied if we're  
19 permitted to offer evidence that goes to that or to the other two of  
20 these subcategories.

21       We understand we will be permitted under any of them to  
22 offer evidence going to the first three subparts because that is what  
23 is expressed and called for by the M.C.A. We do not believe that the

1 M.C.A. is in any way offended by this inquiry and, in fact, it is our  
2 position that the Geneva Convention as a treaty ratified by the  
3 United States has the same status as a federal statute and it would  
4 be an improper construction of the Military Commissions Act to  
5 contend or to interpret it as precluding an Article 5 status  
6 determination.

7           Indeed, the Charming Betsy canon of construction which you  
8 have seen in briefs on many occasions instructs that where possible a  
9 federal statute should be interpreted in a manner consistent with  
10 international law if that's possible. I want to underscore, of  
11 course, that the Third Geneva Convention is not merely a matter of  
12 international law, it is a matter of domestic U.S. law having the  
13 status of a federal statute due to the fact that it's a ratified  
14 treaty of the United States.

15           There is clearly no intention on part of the United States  
16 Congress in the Military Commissions Act to abrogate the Third Geneva  
17 Convention, quite the contrary. Our view is that in light--  
18 especially of this court's rulings that there is doubt concerning  
19 this individual's status, then it is appropriate, indeed necessary to  
20 conduct this inquiry in order to satisfy--in order for the commission  
21 to satisfy itself that it has personal jurisdiction over this  
22 defendant.

1           In fact a second quote from the June 4th order seem to  
2 recognize this, and we believe it implicitly supports the motion that  
3 we have filed asking for a status determination. In that June 4th  
4 order this commission wrote, "Mr. Hamdan is either entitled to the  
5 protections afforded to a prisoner of war, or he is an unlawful enemy  
6 combatant subject to the jurisdiction of the military commission, or  
7 he may have some other status." Accordingly, we feel our motion is  
8 well founded.

9           MJ: Okay.

10          CDC [Mr. McMillan]: I would note that under the Army regulation  
11 which governs Article 5 hearings, that is, Army Regulation 190-8.  
12 The mere assertion of protected status is enough to create doubt  
13 requiring an Article 5 hearing. We believe that there is ample doubt  
14 and the evidence that will be introduced this week will, we think,  
15 confirm the ample doubt requiring an Article 5 inquiry.

16          The arguments advanced by the government in its response in  
17 some respects were a reprise of the position that they had advanced  
18 concerning the 2004 CSRT. One of the arguments was that even if Mr.  
19 Hamdan is entitled to an Article 5 hearing, he has already received  
20 it in this 2004 CSRT. Again, as we indicated in our reply the CSRT  
21 simply did not make the relevant inquiry. It did not inquire into  
22 whether or not the six categories of Article 4 of the GPW were or  
23 were not satisfied. For the same reason that this commission held

1 and the CMCR held in the *Khadr* decision, the CSRT was not an Article  
2 5 inquiry.

3 MJ: Thank you. Have you offered everything you wanted to offer  
4 then?

5 CDC [Mr. McMillan]: Yes, sir.

6 MJ: It turns out that your brief was better than my questions  
7 after all. Thank you.

8 Who is going to argue that this motion for the government?

9 PROS: I will, sir.

10 MJ: Okay.

11 **[The prosecutor moved to the podium.]**

12 PROS: Thank you, sir. May it please the court, fellow counsel?  
13 Let me try to respond directly to some of the issues raised by  
14 counsel for the defense and attempt to go right to the heart of the  
15 matter.

16 The heart of the matter is that hearing, Your Honor, is not  
17 under the language and construction and guidance provided in the  
18 Geneva Convention, Articles 4 and 5 because to begin with we never  
19 reach Article 4 because Article 5 is never properly invoked by the  
20 defense.

21 What they want to rest on is the language specifically  
22 about raising and doubt in what they choose to do is to tie that to  
23 your language in Your Honor's order, where you indicated that there

1 was doubt as to the accused's status. Now the timing of your ruling  
2 is very important in our consideration of this issue. Because as  
3 Your Honor will recall that you made that comment, you issued that  
4 ruling because the CSRT process for proving *in personam* jurisdiction  
5 over Mr. Hamdan was not effective. And in retrospect and in  
6 reviewing that particular process we agree with the court. It makes  
7 a finding of combatancy, it makes a finding of enemy, not to be found  
8 in the statute are the words or in the implementing--the SECDEF's  
9 implementing regulations for the CSRT process are the words to be  
10 found authorizing a finding of lawful or unlawful so to speak.

11 But in this particular case again finding that the CSRT  
12 process is not effective which is what we traveled on almost entirely  
13 the first time we appeared before you, you then dismissed the charges  
14 without prejudice. And what you indicated at that time was "at that  
15 moment" there was doubt, and of course there was doubt, and you  
16 exercised your option at that point to dismiss the charges which was  
17 a result of your doubt. But that was before the government appealed  
18 a simultaneously decided case *United States v. Khadr*. In the *Khadr*  
19 decision what we see is a reinforcement of the M.C.A. as the tool  
20 that governs all aspects of what we are doing here all decisions.

21 Now in establishing within the M.C.A. the criteria to  
22 determine whether or not Mr. Hamdan is or is not an unlawful alien  
23 enemy combatant, Congress chose -- Congress was well aware of the

1 Geneva Convention, they were well aware of the six criteria that are  
2 set out in Article 4, and they intentionally chose to place the first  
3 three in a category which I will refer to as the actions of a  
4 combatant. The other three criteria were placed in another category  
5 and that was called the actions of a civilian. That decision is  
6 reflected in the M.C.A. and in the Manual for Military Commissions in  
7 that the first three are placed in the section dealing specifically  
8 with definitions of a lawful combatant, while the other three are  
9 established as what I would refer to as affirmative defenses.

10 Now, what the court did in *Khadr* was through and through  
11 and counsel for the defendant did went out several sections in this  
12 particular opinion, and I would like to do likewise. But let me  
13 start off by saying, there was a presidential determination, there  
14 were several presidential determinations, and the one that I believe  
15 we have in evidence previously before the court which was listed I  
16 believe as Appellate Exhibit A was the--what we are referring to as  
17 the White House February 7, 2002, designation of al Qaeda as a group  
18 of individuals who are not subject to the protections of Geneva. I  
19 think you and I engaged in a colloquy--if my memory serves me  
20 correct--about whether or not there could be a group determination  
21 and this would be the group determination the counsel for the  
22 defendant believes is improper.



1           I think the result of our discussion was that we all framed  
2 the root determination's about the status of anyone engaged in combat  
3 or potentially in combat because as counsel for the defendant stated  
4 the implications to our own forces who are fighting in the field.  
5 And because of the decision that you originally made, because of the  
6 *Khadr* decision, and because of the posture in the court right now, we  
7 are not doing that. We are in fact going forward to prove under the  
8 M.C.A. that Mr. Hamdan is an alien unlawful enemy combatant.

9           Now counsel for the defendant made an interesting point,  
10 and the point that he raised was that an individual could be a member  
11 of al Qaeda and can theoretically not be an unlawful alien enemy  
12 combatant, or he could be a person subject to the protections of  
13 Geneva. Likewise, I would offer to the court that an individual does  
14 not have to be a member of al Qaeda in this conflict to not be  
15 subject to the protections of the Geneva.

16           So both sides of the coin apply and in this particular  
17 case, we are going to prove individually notwithstanding the fact  
18 that we intend to prove that Mr. Hamdan was a member of al Qaeda, we  
19 will also prove that his actions independently violated the Manual  
20 for Military Commissions and the M.C.A. The language, which I  
21 believe will be of interest to the court at this time comes out in  
22 *United States v. Khadr*----

23           MJ: Colonel Britt.

1       PROS: ----and I'll quote briefly. I----

2       MJ: Colonel.

3       PROS: Yes, sir.

4       MJ: I think we are getting a signal from the interpreters that  
5 you're speaking too quickly.

6       PROS: All right, sir. I apologize to the court and to the  
7 interpreter. In the first instance, the military judge in the  
8 commissions process returns jurisdiction by applying, not Geneva, but  
9 the Military Commissions Act. The language in *Khadr* specifically  
10 addressing this point on page 20 of the opinion is where the court  
11 concludes that the military judge erred in ruling, he lacked  
12 authority under the Military Commissions Act--I don't see Geneva  
13 mentioned directly or indirectly in this paragraph--to determine  
14 whether Mr. Khadr is an unlawful enemy combatant for purposes of  
15 establishing the military commissions initial jurisdiction to try  
16 him.

17           The court goes on. The unambiguous language of the M.C.A.  
18 in conjunction with a clear and compelling line of federal precedent  
19 on the issue of establishing jurisdiction in federal courts convince  
20 us the military judge possessed the independent authority to decide  
21 this critical jurisdictional prerequisite. Nowhere in there is found  
22 the language with or without the help of Articles 4 and 5 of the  
23 Geneva Convention. A military commission, in fact, is no different.

1 Directing our attention to R.M.C. 201b(3) a military commission to  
2 wit, Your Honor, always has jurisdiction to determine whether it has  
3 jurisdiction.

4 Now, the procedure, Your Honor, set out in *Khadr* which is  
5 as I said previously is our light shining the way forward. In clear,  
6 convincing, and forceful language states on page 24 and this view is  
7 supportive in the Rules for Military Commissions which provide  
8 exactly the procedures so the military judge can hear evidence,  
9 decide factual and legal matters concerning the court's own  
10 jurisdiction for when the accused appeared in court, to wit, Mr.  
11 Hamdan. Rule 907b allows the accused to raise a motion to dismiss  
12 for lack of jurisdiction which has been appropriately and timely done  
13 in this instance, and recognizes the lack of jurisdiction as a  
14 nonwaiverable grounds for dismissal of charges which Your Honor did.

15 The burden of persuasion to the prosecution on the motion  
16 is in fact preponderance of the evidence going to the defense's claim  
17 that we have to prove our position beyond a reasonable doubt, which  
18 would be the standard for an affirmative defense. We're not dealing  
19 with that. We're not dealing with the last three criteria that were  
20 set out in Article 4 of the Geneva Convention.

21 The *Khadr* court concluded, Your Honor, in the pen ultimate  
22 paragraph, "We find the military judge had the power and the  
23 authority under subsection i of section 948a (1)(a) of the M.C.A. to

1 hear evidence concerning and to ultimately decide Mr. Khadr's  
2 unlawful enemy combatant status." Let me submit to the court that  
3 the M.C.A. is the appropriate and governing authority to decide this  
4 particular issue and that's been reinforced by the latest view of the  
5 military commissions process in *United States v. Khadr*. Thank you.

6 MJ: Where would you say we can find the three additional  
7 criteria that the defense cites from Geneva in the affirmative  
8 defenses? There is a section of the manual that lists affirmative  
9 defenses and you called those "actions of a civilian," somehow  
10 included in the manual as affirmative defenses.

11 PROS: Sir, I would view those----

12 MJ: Can you explain that again?

13 PROS: Sir, I would view those as affirmative defenses which the  
14 defense would raise when the detainee is charged under the M.C.A. for  
15 violations. I don't view those necessarily as jurisdictional  
16 defenses. Those are not set out in the M.C.A. as jurisdictional  
17 defenses.

18 If I would direct--if I may please quote portions of  
19 Article 4 and I have difficulty understanding in the context of this  
20 case, understanding that Mr. Hamdan may go forward on the merits, but  
21 on the limited issues of jurisdiction I have difficulty understanding  
22 where we find aircraft crews, war correspondents, members of labor  
23 units or masters, pilots, apprentices, Merchant Marine and crews of

1 civil aircraft. I don't see where any of that has been even as a  
2 threshold matter--invoked by Mr. Hamdan, to even get us to the point  
3 where we discuss these as possible defenses to jurisdiction. So far,  
4 in response to the defense, I would contend to the court that I have  
5 heard these simply recited as three missing portions in the M.C.A.  
6 which simply need to apply because they're listed in Geneva.

7 MJ: How do you respond to the defense's argument that this  
8 Military Commissions Act should be construed consistent with Geneva  
9 Conventions which lists additional ways in which someone can be a  
10 lawful combatant on the battlefield?

11 PROS: I think it is consistent, Your Honor. It is consistent  
12 in the sense that the first three criteria that were set out in  
13 Article 4 of the Geneva Convention are also the first--are the only  
14 three that are set out in the Military Commissions Act. I believe  
15 that's consistent, but I believe to the extent that it's  
16 inconsistent, that the other three provisions of Article 4 are  
17 missing from the M.C.A. indicates an intent of Congress not to  
18 provide those as potential, at least jurisdictional defenses.

19 MJ: What would it take, in your opinion, for the defense to  
20 assert his entitlement to in Article 5 tribunal? Do you think it's  
21 enough if the defense counsel stands up and says, "My client claims  
22 to be a civilian or claims to be a prisoner of war."

1       PROS: I think I would have to turn back to the triggering  
2 provisions of Article 5, and if we are saying there was any doubt, I  
3 think the doubt was raised because the government shows an avenue of  
4 proving jurisdiction.

5       MJ: Okay.

6       PROS: Because the governor--I'm sorry, Your Honor, because the  
7 government shows an avenue of proving jurisdiction that was not  
8 invalid. Subjectively not given the chance to provide our evidence  
9 on the merits of the jurisdictional issue, at that particular time  
10 there was no way for the court to make a determination under the  
11 first prong of the test set out in the M.C.A., the first of two.

12       MJ: Okay. Well, it sounds like you've modified your written  
13 response by conceding that the CSRT process did not address this  
14 issue; is that correct? Your written filing you argue that CSRT  
15 provided the Article 5 hearing that the accused is entitled to, if in  
16 fact he is entitled to one. Do you still believe that to be true?

17       PROS: I'm going to concede that, sir.

18       MJ: You are going to concede that the CSRT did not?

19       PROS: The CSRT did not. What I am conceding is that the CSRT--  
20 and I believe the court has spoken to this already, so my views are  
21 consistent with the court of military review--that what the CSRT did  
22 not do was, it never made a determination of unlawfulness and when  
23 faced with a ruling from the court on that issue, I'm forced to

1 concur. And I understand our argument was to import some other  
2 language from presidential determinations, etcetera; in order to make  
3 that language that Congress had information before it from which not  
4 was the intent of Congress is to make that particular argument.

5 Now to that extent that may well be the fact, but  
6 ultimately what we had in front of us in the form of legislation was  
7 a vehicle we chose to operate under that the court of military  
8 commissions I believe said was inadequate, so I am forced to take  
9 that position.

10 MJ: Okay. Neither side has argued Section 948b subparagraph  
11 (g) which is labeled "Geneva Convention not establishing source of  
12 rights." The text says, "No alien unlawful enemy combatant subject  
13 to trial by military commissions under this chapter may invoke the  
14 Geneva Conventions as a source of rights." Have you thought about  
15 how that might apply to this motion?

16 PROS: Obviously that particular section is very appealing and  
17 well might control in this instance. I would anticipate that the  
18 defense might argue that the actual language is "no alien unlawful  
19 enemy combatant" and it tends to read or imply that a determination  
20 of unlawfulness has already been made before we reach that point.  
21 That's what I would anticipate the defense would argue.

22 Now, I would argue contrary, and what I would argue is once  
23 again the language that is set out in *Khadr* opinion wherein a proper

1 charging decision simply correctly laying out the elements asserting  
2 jurisdiction in the first instance on the charge sheet provides the  
3 government at least with a *prima facie* showing of jurisdiction--in  
4 *personam* jurisdiction. And accordingly, at that particular point  
5 until properly challenged this section would apply. So I would  
6 leave--leave it up to the court to de-conflict those different  
7 interpretations.

8 MJ: Well, let me ask the question a different way. Until the  
9 court has decided that someone is an alien unlawful enemy combatant,  
10 does this section suggest that the Geneva Convention does apply?

11 PROS: I would have to--I would have to fall back on the  
12 assertion that properly charging Mr. Khadr and asserting that he is  
13 in fact an unlawful alien enemy combatant having done so properly, it  
14 has not been challenged that isn't properly charged. The challenge  
15 is to whether or not a variety of arguments as to whether or not the  
16 Military Commissions Act applies to for determining the fate of Mr.  
17 Hamdan.

18 I would go back and say because he is properly charged,  
19 Your Honor, that particular *prima facie* showing continues. Because  
20 what Your Honor found was in the first instance that we used the  
21 wrong vehicle and we haven't been given an opportunity until now to  
22 reply which is what we are prepared to do.



1 MJ: Okay. Well this is a very interesting question and I  
2 appreciate your argument. I am not sure what the answer is.

3 Does the defense want to respond to that last question  
4 about section 948b subsection (g)?

5 CDC [Mr. McMillan]: Yes, Your Honor, if I may very quickly.  
6 Colonel Britt did indeed correctly anticipate the defense's response  
7 to the question from the court concerning subpart (g) of 948b. The  
8 language of that subpart says, "No alien unlawful enemy combatant  
9 subject to trial by military commissions under this chapter may  
10 invoke the Geneva Convention as a source of rights." It is indicated  
11 here--it is predicated that there be a finding of alien unlawful  
12 enemy combatant status, and indeed that is what the Article 5 status  
13 determination we asked for is designed to achieve.

14 To the extent that this statute is valid and enforceable,  
15 it only applies after a finding of enemy unlawful combatant status  
16 has been made. Until the Article 5 inquiry is conducted, there has  
17 been no finding of enemy unlawful combatant status. May I respond to  
18 one or two other points?

19 MJ: Yes, please.

20 CDC [Mr. McMillan]: The prosecution raised the question as to  
21 whether or not Mr. Hamdan has properly invoked the right to an  
22 Article 5 hearing. The prosecution in its papers has claimed that  
23 Mr. Hamdan did not properly specify the subparts of Article 4 under

1    which he may be protected.  And yet they concede in footnote 4 of  
2    their brief that in the federal court proceedings that predated the  
3    proceedings in this commission, Mr. Hamdan has invoked his POW status  
4    at various times.  In the U.S. District Court, for example, in his  
5    opposition to the government's motions to dismiss, Mr. Hamdan  
6    asserted entitlement to POW status under the subpart that I call the  
7    court's attention to part (a)(4) involving civilians that accompany  
8    the armed services.

9               Mr.--the prosecution also made a comment or two concerning  
10   what the court was referring to when it referred to doubt, to doubt  
11   in the June 4th order.  And I would just direct the court's attention  
12   to the relevant passage from the June 4th order in which this  
13   commission indicated its concurrence with the District Court's view  
14   of the matter.  And the reference there is the U.S. District Court in  
15   the District of Columbia holding that there was sufficient doubt  
16   under Article 5 to require an Article 5 inquiry before Mr. Hamdan  
17   could be subject to jurisdiction of the military commissions.

18              So the courts order made it very clear that in a sense it  
19   was adopting the reasoning of the District Court in that regard.  
20   There is no doubt about what the court meant when it said there is  
21   sufficient doubt concerning Mr. Hamdan's status under the law of war.

22              MJ:  Very good.  Thank you, sir.  That ELMO is coming in handy,  
23   isn't it?

1 CDC [Mr. McMillan]: That order? Yes, sir.

2 MJ: The ELMO and your highlighter. Okay. I'll take that  
3 motion under advisement.

4 This morning I received a motion to compel production of  
5 witnesses filed by the defense and asking for the court to require  
6 the government to produce nine witnesses. Is the government prepared  
7 to respond to this motion today?

8 CTC [Mr. Murphy]: It is, Your honor.

9 MJ: Are you going to be handling this for the government?

10 CTC [Mr. Murphy]: Yes.

11 MJ: Wait, wait just a moment. This is the defense's motion?

12 CTC [Mr. Murphy]: It is, sir.

13 MJ: So I will give them first chance to argue it if they wish.  
14 It doesn't request oral argument as I recall.

15 CDC [Mr. Swift]: We did not and in view of the fact that the  
16 prosecution hasn't been able to respond yet to it, I'll defer on the  
17 motions that we have put forth and if the government--I'm presuming  
18 opposes them, let them go forward at this time rather than----

19 MJ: Okay, fair enough.

20 CDC [Mr. Swift]: ----continue on and then address what points  
21 they address.

22 MJ: Thank you.

1           CTC [Mr. Murphy]: Thank you, Your Honor. As the Court noted we  
2 received this--actually it was filed electronically with our office  
3 late last night. We really looked at the first time this morning and  
4 did endeavor to carefully consider each of these requests, I can  
5 articulate for the commission the government's view on the production  
6 of each of these witnesses and some proposed alternatives to deal  
7 with some of these requests. We propose that we go through these in  
8 the order they are listed in the defense's motion. The pages are  
9 unnumbered, but for each section that lists each of their requests  
10 for witness is individual.

11           Their first requested witness is Professor Brian Williams  
12 who is present at this location. The government has advised the  
13 defense that we will not oppose of calling him as a witness.

14           MJ: Professor Williams is here?

15           CTC [Mr. Murphy]: He is here, Your Honor.

16           MJ: Well, I never cease to be amazed. Okay, looks like the  
17 motion----

18           CTC [Mr. Murphy]: Unless that is changed I believe that is the  
19 case.

20           MJ: ----is granted as to Professor Williams.

21           CTC [Mr. Murphy]: Now on the second and many of the subsequent  
22 requests, I will be referring to some particular synopsized expected  
23 testimony, if the defense puts forth as its basis for request and

1 production of these witnesses. The government reviewed these  
2 requests in several ways. First, we looked at R.M.C. 703(c)(2)(B)(i)  
3 which basically sets forth a relevant and necessary test for the  
4 production of a particular witness.

5 We also looked at the synopsis provided in the motion by  
6 the defense, and we also collectively looked at the evidence the  
7 government had regarding these particular requested individuals. So  
8 it is that analysis that we went through.

9 Starting with the second requested witness, Khalid Sheikh  
10 Mohammed I noted that even the defense's synopsis of expected  
11 testimony, they say, and I quote right from the middle of that  
12 paragraph, "However, based on publicly available statements made by  
13 the government and Mr. Mohammed's the defense believes Mr. Mohammed  
14 will testify regarding his role in al Qaeda."

15 That synopsis is what the government would characterize as  
16 speculative as to what his testimony may or may not be, and,  
17 therefore, would fail under an analysis of R.M.C. 703 to be found to  
18 be a relevant and necessary witness, and, therefore, we would oppose  
19 production of that witness.

20 Similarly, on the third and the fourth requested witness,  
21 the third being al-Shib and the fourth being al-Libi. Again you find  
22 this highly speculative synopsis of what that expected testimony may  
23 be regarding.

1           Mr. al-Shib, request three, the defense says, "The defense  
2 believes Mr. Bin al-Shib will testify regarding his role in al  
3 Qaeda." Once again that is an acknowledgment by the defense of the  
4 highly speculative nature of what he may or may not say, and,  
5 therefore, does not meet the relevant and necessary criteria to  
6 produce the witness under 703.

7           Returning now to requested witness four, al Libi. Again in  
8 the synopsis of the expected testimony the defense again says, "The  
9 defense believes that Mr. al Libi will testify regarding his role in  
10 al Qaeda." Speculative and certainly not a basis to produce the  
11 witness.

12           The government has endeavored to be very fair with each of  
13 these requests and did come to a different conclusion regarding  
14 number five, Said Boujaadia. The government will not oppose access  
15 to this witness or making him available for testimony in this  
16 hearing.

17           MJ: Does that mean the government is prepared to grant immunity  
18 to this witness?

19           CTC [Mr. Murphy]: That issue has not been resolved yet, and I  
20 would like to have an opportunity to confer on the latest status of  
21 that.

22           MJ: Fair enough.

1           CTC [Mr. Murphy]: But what I can say at this point is that we  
2 are not going to oppose access or production. That is a separate  
3 question that the judge properly asks of the government, and I would  
4 simply note that it is a convening authority determination as to  
5 whether to grant that or not. We will certainly advise the court of  
6 what we may learn in that regard.

7           MJ: Very good.

8           CTC [Mr. Murphy]: Number six----

9           MJ: Well, forgive me. Does that mean that there are some  
10 discussions going on about the----

11          CTC [Mr. Murphy]: I have, Your Honor----

12          MJ: ----ability of this witness to testify?

13          CTC [Mr. Murphy]: ----I have not been personally involved with  
14 those discussions, so I can't report as to what I know personally.  
15 What I would like to advise Your Honor is simply that we will advise  
16 you----

17          MJ: Very good.

18          CTC [Mr. Murphy]: ----when we get an answer to that question.

19          MJ: And the defense I hope.

20          CTC [Mr. Murphy]: All right, turning now to the sixth request,  
21 Al-Sharqawi. Once again we do have speculative--a speculative basis  
22 for the request. In the summary the defense says, "However, the  
23 defense believes this requested witness can testify that he knew Mr.

1 Hamdan was one of Usama bin Laden's driver's or bodyguards, but that  
2 Mr. Hamdan was neither a member of al Qaeda nor a combatant." Once  
3 again you have highly speculative summary of what is being requested  
4 there. However, I would note that we have invited the defense to  
5 meet with us on this particular witness to consider a stipulation of  
6 expected testimony that would follow from some reports that we  
7 provided to the defense today. And that invitation remains open as a  
8 way to deal with this particular issue, but we don't think production  
9 of the witness is called for.

10 Now, number seven, al-Bahri. We also have similar  
11 speculative summary of the testimony. The word "believe" does not  
12 appear in there, but the defense does say that, "he is expected to  
13 testify that Mr. Hamdan never joined al Qaeda." Again that is  
14 somewhat of an unequivocal representation as to what his testimony  
15 may or may not be. We have noted for the defense, and they are well  
16 aware of this themselves, that they have an audiotape of this  
17 witness. They also have an English transcription of that interview  
18 that they conducted of this witness. And we have invited them to  
19 come to us for the proposal to introduce that if they wish to do so.  
20 Currently it is not listed on their evidence list, but we have made  
21 them aware of our position in that regard.

22 Your Honor, we have two remaining. The eighth witness  
23 request al-Qala'a is the brother-in-law of the accused. Again, we



1 have a very speculative summary of his expected testimony. Quoting  
2 again from the summary, "Mr. al-Qala'a is expected to testify that  
3 Mr. Hamdan was not an extreme--Muslim extremist." Again a very  
4 speculative assertion as to what he may or may not say. We don't  
5 think he should be produced.

6 And finally the ninth request is the wife of the accused.  
7 Again the summary says what she is expected to testify that Mr.  
8 Hamdan--Mr. Hamdan's reasons for travel to Afghanistan in 1999 and  
9 2001 and the reasons Mr. Hamdan did not leave Afghanistan with his  
10 wife in 2002. What we have offered to the defense in that regard is  
11 we don't believe that she should be produced. We do believe her  
12 testimony is not relevant and necessary, but we have offered to  
13 engage in discussions for a stipulation of her testimony.

14 So, Your Honor, I hope the court can see that really rather  
15 than coming out here and summarily denying each request have  
16 considered each carefully and proposed fashioning a remedy some of  
17 the information before the commission, but also have asserted that  
18 where the requests are clearly speculative they should be denied.  
19 Those are the government's positions on each of these witness  
20 requests.

21 MJ: Well, let me ask you a question. Where the synopses of  
22 expected testimony are speculative, the defense has not had access to  
23 the witness for interview. One of the other motions before the court

1 asks me to order access. Does the government oppose them going over  
2 to interview these witnesses this week----

3 CTC [Mr. Murphy]: We do, Your Honor.

4 MJ: ----so that they can give you a less speculative synopsis?

5 CTC [Mr. Murphy]: Well, Your Honor, I would have several things  
6 to say in that regard. First of all, they can talk to their own  
7 client who can provide them with information to determine whether or  
8 not there really is, in fact, a solid basis for this testimony rather  
9 than the speculative assertions that are in here. We don't find that  
10 to be the case.

11 Secondly, if you were to go down that road, you could use  
12 that as an argument to interview every detainee in the camp because  
13 in theory perhaps they might under some imagined possibility have  
14 something to say. So I think taken to its extreme that would open up  
15 virtually an interview of every conceivable person here and overseas  
16 and in other places. And when you really look at the intent of 703,  
17 you need more than that. You need a showing that it is relevant and  
18 necessary, and mere hoped for evidence gathering is not enough to  
19 produce the witness or we believe to have access to that witness.

20 MJ: Well----

21 PROS: Just one moment, Your Honor, I apologize to the court.  
22 If we could make one more brief?

23 MJ: Okay.

1 [The prosecution team conferred.]

2 CTC [Mr. Murphy]: Your Honor, I appreciate the--my co-counsel  
3 wanted me to highlight one point that I think is relevant and that is  
4 that three of these detainees are also considered high-value  
5 detainees with extremely limited access: KSM, al-Shib, and al Libi.

6 MJ: Two, three, and four.

7 CTC [Mr. Murphy]: The three are Khalid Sheikh Mohammed, al-  
8 Shib, and al Libi.

9 MJ: Okay. Tell me what that means.

10 CTC [Mr. Murphy]: These are individuals who have been given  
11 special designation very limited access, including limited access to  
12 government--other government entities interviewing them. They have  
13 high security concerns, they have highly classified information, and  
14 that access to these particular individuals would be of great concern  
15 to the government because of those reasons.

16 MJ: Okay. I understand your position. Thank you for----

17 CTC [Mr. Murphy]: Thank you, Your Honor.

18 PROS: Your Honor, may I----

19 MJ: ----for the efforts you've made to work this out with the  
20 defense. Did you want to add something Colonel Britt?

21 PROS: Yes, sir. If I could add one more thing. In order to  
22 access the three high-value detainees which Mr. Murphy mentioned, one

1 has to be additionally read into a special access program, that I  
2 know for a fact none of the defense attorneys are read into.

3 MJ: Okay, well, Mr. Swift.

4 **[The civilian defense counsel, Mr. Swift, moved to the podium.]**

5 CDC [Mr. Swift]: Your Honor, beginning with the three "high-  
6 value detainees." Each of them are high-value because they were at  
7 the very heart of----

8 PROS: Objection, Your Honor. Assertion of national security  
9 privilege.

10 CDC [Mr. Swift]: Your Honor?

11 PROS: And I think at this time, Your Honor, if we could clear  
12 the courtroom and have conversation with the court's consent.

13 MJ: Let's think about this. Why don't you skip over that and  
14 go to your next point so that we don't have to clear the courtroom  
15 unnecessarily? Perhaps we could take this particular argument up at  
16 the end of the day when it's convenient to clear the court before a  
17 recess anyway.

18 PROS: Thank you.

19 MJ: Can we do that?

20 CDC [Mr. Swift]: Well, to avoid the national security  
21 privileges, I'll move straight to al Libi.

22 MJ: A different witness.

1 CDC [Mr. Swift]: Because I am going to be referring from his  
2 unclassified summary and I hope the national security process doesn't  
3 get there. One of the things that he asserted in his unclassified  
4 part was that he was in charge of vetting those who were sponsored  
5 into--those persons in Afghanistan who were sponsored into be al  
6 Qaeda members; that is, at the center of the Al Qaeda organization.  
7 At issue here, and the defense during this entire motion is not going  
8 to argue that anyone who was participating in al Qaeda terrorist  
9 activities is entitled to lawful combatant protection. Through Dr.  
10 Williams we're going to----

11 MJ: I'm sorry, I'm sorry. Give me that last sentence again,  
12 please. The defense is not going to be arguing.

13 CDC [Mr. Swift]: That anyone who was a member of al Qaeda  
14 terrorist activities was entitled to lawful combatant privileges. We  
15 would not dream of asserting that. What we are going to put on and  
16 put into context with each of these people is Dr. Williams.

17 Dr. Williams is going to testify that there were in  
18 Afghanistan basically two groups. Again, this is from his  
19 unclassified testimony and his unclassified research was what he  
20 calls the Ansars which were Arab fighters which included among them  
21 followers of Usama bin Laden and then what he refers to as al Qaeda  
22 al Sulbah--I hope I pronounced that correct--or "the solid base."

1 And that this organization was secret and conducted terrorist  
2 activities largely outside.

3           It will be our proposition that each of the listed high-  
4 value detainees were members of the second organization. That they  
5 were aware of that membership that because you were a follower of Bin  
6 Laden didn't mean necessarily that you engaged in terrorist  
7 activities or even supported or at times were aware of them.

8           Where Mr. Hamdan fits on that scale is going to be the  
9 critical issue for this court to determine his combatant status. Yet  
10 we are not allowed to interview the people who have the absolute  
11 knowledge. They know the answer and to that said, we simply distort  
12 the fact finding of this court. We set out to, Your Honor, in our  
13 part that they do have the basis unlike what the government has  
14 argued earlier that it's purely speculative. We are not seeking  
15 every detainee. We are seeking the detainees who basically would  
16 know, rather than walking down through and interviewing every single  
17 detainee in this camp.

18           Under the Geneva Conventions as we argued in our earlier  
19 argument, we're suppose to have uninhibited access to witnesses. It  
20 is hard to say that these persons are not potential witnesses and not  
21 germane to the issue before this court. We are stuck with a--if we  
22 adopt the chicken, the government's argument, we are stuck with a  
23 chicken and egg problem. Where we can never meet it because the

1 government has already decided we don't need it and that defeats the  
2 purpose of the hearing.

3           We, therefore, set the--we were placed in a difficult  
4 position as the defense having not been able to interview them. But  
5 given the choice between not having the witness with no interview or  
6 having the witness and having some surprises when they were produced  
7 to testify given that they had relevant knowledge, we--well, let's  
8 see. Although we consulted with our client, as Your Honor well knows  
9 in any proceeding you may have what you expect and what you believe,  
10 and then you have what you get, and sometimes it's not what you want.  
11 And we wouldn't ask on, any of these witnesses say to this court  
12 absolutely that's what they'll say. We have what we expect they'll  
13 say based on interviews, and what we believe they'd say based on our  
14 investigation today, and this assertion that each of these witnesses  
15 have relevant knowledge. Understanding that we may be unhappy with a  
16 particular answer. However, we've noted that in each of these cases  
17 in the CSRT's purported to give exculpatory evidence for at least  
18 some detainees. And to that extent we would want to at least  
19 interview them and in contrary to interview them, have them be  
20 called. We were at a position at this time where we had to put the  
21 witnesses we wanted, even though we had not had access to all the  
22 witnesses.

1           Moving on, and the Boujaadia issue really is now  
2 outstanding in the sense that we will wait to hear back. If we have  
3 immunity, the issue is dead and will present him. Lastly, or with  
4 the question of the facilitator who was listed where a stipulation  
5 was expected. I would direct the court's attention to our military  
6 rules where are and the----

7           MJ: I'm sorry, forgive me, you've lost me. Who are you talking  
8 about now?

9           CDC [Mr. Swift]: Abdul Da----

10          MJ: Give me the number.

11          CDC [Mr. Swift]: Abdul Rahim al-Sharqawi.

12          MJ: I'm sorry, which number?

13          CDC [Mr. Swift]: He would be the, number six. Thank you.

14          MJ: Okay.

15          CDC [Mr. Swift]: With regards to a proposed stipulation  
16 testimony. I would direct the courts attention to the *United States*  
17 *versus Allen* at 31 MJ 572, because it talks directly to the idea. If  
18 a witness is material and based on our interview--we did previously  
19 interview Mr.--number six, back in 2004--the fact that he knew bin  
20 Laden, or excuse me not only knew bin Laden, knew our client, knew  
21 our clients activities, testified--or told us at the time that he was  
22 only a driver during our interview of him. Was aware that there were  
23 many around bin Laden who are not members of al Qaeda al Sulbah. To



1 establish that fact by someone, who has admitted member, would be  
2 relevant to this court and material in making that decision.

3           When we have relevant material evidence what *Allen* says is  
4 that stipulated testimony is the least preferred that live witness  
5 testimony is always preferred. And here where he's down the road we  
6 would disagree with the stipulation and say produce him. The  
7 government starts at the wrong place and says, "Well we should see if  
8 we can get a stipulation first." Actually the preference under the  
9 military rules, which are applicable here as well, is live testimony.

10           That's similar also for the two members, yes, there are  
11 alternatives for us to enter but the preference is live testimony and  
12 until there is a finding of unavailability, we should not move to see  
13 if there is some alternative. The first question is if the relevant  
14 and material--on the family members, they should be produced.  
15 Alternatively then we will look next--because they are beyond the  
16 subpoena power of this court--a deposition, if could be done and  
17 would be appropriate; and, if not, then are there other forms that  
18 would be appropriate. But we should not start out with a rule that  
19 favors all alternatives to live testimony. I understand at military  
20 commissions live testimony is not always required.

21           In addition when we go to the secret section, it would be  
22 my co-counsel notes to me and I'm trying to dance around it we have  
23 been provided some of his statements that are today in a secret

1 document so I am not referring to them out of an abundance of  
2 caution, but we would note that probably need to take that up in a  
3 closed session.

4           With regards to the wife, she is absolutely material. She  
5 was with the defendant, Mr.Hamdan, literally hours before he was  
6 captured. She can testify to his intent. She can testify to the  
7 circumstances. She can testify to what he was doing. It's hard to  
8 come up with a more material witness than that.

9           And so she certainly should have the opportunity to find  
10 that she should be produced, noting that we might have to seek  
11 alternatives if she refuses to come because she is beyond the  
12 subpoena power of this court. But that doesn't guide our motion on  
13 production to begin with. That's speculative. First, the order to  
14 produce and then we see if we can't, and we have it in reverse. At  
15 least the government does at this point. And so we argue that the  
16 court should order her production and then we go from there and see  
17 what happens as far as having her produced because I would be  
18 disingenuous with this court, if I indicated that she, Mr. Hamdan's  
19 brothers in-law, were within the subpoena power of this court.

20           Again we believe his brother-in-law would be relevant both  
21 because it is--both brothers-in-law. One was with Mr. Hamdan in  
22 Afghanistan was at one time in charge of the security detail. He  
23 knew what the responsibilities of particular individuals were. He

1 can speak to why Mr. Hamdan was there, what Mr. Hamdan was doing for  
2 the period of time up until 2000. He can't speak after that on Mr.  
3 Hamdan's last return, because he did not return there. But he can  
4 speak to the period of 1995 until 1999, in as much as that as  
5 relevant in a combatant finding.

6 We would agree were this court to find that Mr. Hamdan's  
7 activities prior to 2001 are not relevant to his combat status that  
8 he need not be produced, because he would not provide material  
9 evidence for a period of time after September 11. He did not--he was  
10 in custody, and he did not see or have any contact with Mr. Hamdan.  
11 With regards to the other brother-in-law, we believe he is absolutely  
12 is relevant because he knows the reasons for Mr. Hamdan's return on  
13 the last occasion and on the occasion when he was captured.

14 MJ: Which was the one, excuse me, you mentioned the brother-in-  
15 law. Is this number eight; Mr. al-Qala'a?

16 CDC [Mr. Swift]: Eight is Nasser al-Bahri is the brother-in-law  
17 who was in Afghanistan with Mr. Hamdan, Muhammad----

18 MJ: Which one's testimony reflected the period '95 to '99?

19 CDC [Mr. Swift]: Nasser al-Bahri.

20 MJ: Okay, I didn't get that from your motion, okay.

21 CDC [Mr. Swift]: Mohammed Ali Qassam al Qala'a and--I did not  
22 pronounce that correctly--reflects would testify as to Mr. Hamdan's

1 reasons for returning to Afghanistan in 2000. And nine is Mr.  
2 Hamdan's wife and she was with him hours before he was captured.

3 MJ: Okay. Well, how do you respond to my unease with the fact  
4 this motion was filed this morning. We're here in Guantánamo Bay,  
5 these witnesses are in Yemen, and you are asking me to compel their  
6 production for a hearing that has been set here for a couple months  
7 now.

8 CDC [Mr. Swift]: The history, I think is fair in this, Your  
9 Honor. We submitted the witness request on this court's deadline.  
10 The court set, I believe a week ago, to submit our witnesses. We  
11 submitted it. We heard nothing from the government and having heard  
12 nothing from the government as to whether they would be produced or  
13 the government's position.

14 We contacted them--we contacted the government to find out  
15 the position on Friday afternoon. We had expected to receive a  
16 written reply on what their position was fairly immediately. On  
17 Friday afternoon, their position was that even Dr. Williams would not  
18 be produced. Dr. Williams subsequently through the convening  
19 authority's office was--we were allowed to write orders for his  
20 production, and the government changed their position upon  
21 interviewing him when he came down here, on that one.

22 We never received notice on all the other ones really until  
23 Friday afternoon. Given the travel dates that we had on Monday and

1 our ability to write this motion for production, we did it as timely  
2 and as quickly as we possibly could under the circumstances. It  
3 would be difficult to say that we should pre-judge and write a motion  
4 for production for something that had not yet been denied  
5 anticipating that the government will deny all our witnesses, yet  
6 that's what would've been required.

7 MJ: Okay. Let's take a look here. Okay. Let me ask the  
8 government, if I can. With respect to witnesses six and seven, I'm  
9 sorry, six. He is here in Guantánamo Bay?

10 CTC [Mr. Murphy]: He is here, Your Honor.

11 MJ: Do you oppose the defense access to interview this witness  
12 even though he is not listed as one of your high-value witnesses?

13 CTC [Mr. Murphy]: We do, Your Honor. And if could maybe I  
14 could speak to that issue a little bit more for the court. I think  
15 it's important to state as a part of this hearing that the government  
16 continues to take its discovery obligations seriously including  
17 *Brady*. So for the defense to argue that they are entirely in the  
18 dark really ignores the fact that the government has an affirmative  
19 obligation if it knows about evidence that is producible, to produce  
20 it, and we will of course do that. So I think that is important to  
21 consider in the access issue.

22 I think it's also important to consider the fact that this  
23 is a limited hearing, this is not the trial. This is only a status

1 determination as to whether this accused is an alien unlawful enemy  
2 combatant.

3           Now in terms of the court's specific question to the  
4 government of do we continue to oppose access, we do. And the reason  
5 we do is the defense has not set forth anything more than speculation  
6 on this witness and the others that I've identified. And if the  
7 standard is that they can raise the mere possibility that someone  
8 might say something, and that gives them access, that's going to open  
9 up the opportunity for them to interview hundreds of people, and that  
10 should not be the standard.

11       MJ: Okay. Anything final from the defense?

12       CDC [Mr. Swift]: Yes, Your Honor. I would like to address the  
13 idea that, if there were exculpatory evidence in these witnesses,  
14 we'd have gotten it. And I think the case of Mr. Boujaadia is  
15 illustrative. Once we put Mr. Boujaadia on this, we begin to have  
16 contact with his counsel. One of the things his counsel furnished to  
17 us was his admin--his admin determination on release. In that  
18 determination, we have that in number 10 in the unclassified summary,  
19 that the Afghan opposition figures took possession of two SA-7  
20 missiles and an ICOM handheld radio from Arabs killed in the  
21 gunfights. And I stress in here, from Arabs killed in the gunfights.

22           I would submit that's fairly exculpatory as to whether Mr.  
23 Hamdan had them. We received--I'll slow down. And we received that

1 Monday from Mr. Boujaadia's counsel. We understand that the  
2 government has a great deal to do; they have not yet answered our  
3 discovery requests from May on these issues. We have been provided  
4 evidence in anticipation of this hearing, but we have not had an  
5 answer to our discovery requests as to exculpatory evidence and there  
6 is a duty and inherent on us as counsel to go out and investigate on  
7 Mr. Hamdan's behalf.

8           It is not the government's duty to conduct both  
9 investigations. We have a duty to investigate, and as such, we would  
10 submit: (a) that simply because the government is not yet in  
11 possession of exculpatory evidence where Mr. Hamdan is concerned with  
12 these witnesses makes them irrelevant for a fishing hunt should not  
13 be dispositive. As we find--as we start to look for evidence and to  
14 conduct these interviews we find exculpatory evidence. What is  
15 germane to us is, do they have material knowledge. And in Mr.  
16 Boujaadia because he was captured in the same operation and Mr.  
17 Hamdan's family, and in these high-value detainees, each one of these  
18 persons have material knowledge. And we submit to the court that  
19 that's material in making this decision, and it is not for the  
20 government to decide in advance whether what they have to say will be  
21 of any help whatsoever. It's whether it could be and then the court  
22 makes its determinations.

1 MJ: I guess we can set aside for the present the motion with  
2 respect to testimonial immunity. It sounds like that's a matter that  
3 the parties are discussing; is that right?

4 PROS: That's correct, Your Honor.

5 CDC [Mr. Swift]: A clarification. I believe the prosecution is  
6 talking about that with the convening authority----

7 MJ: ----convening authority.

8 CDC [Mr. Swift]: Were not in--we seek it and will make a motion  
9 if it's--a motion it appears may not be ripe, for want of a better  
10 term.

11 PROS: Judge, just one more thing for the record. We have no  
12 objection to Mr. Boujaadia testifying, none whatsoever. We would  
13 like to resolve the immunity issue on behalf of Mr. Boujaadia and  
14 with assistance from his habeas counsel if necessary. But we have no  
15 objection whatsoever. Matter of fact, I believe we have a transport  
16 plan to coincide with our hearing this afternoon.

17 MJ: Okay. Well is he going to exercise his right to remain  
18 silent once he gets here; or do we know that?

19 PROS: We are going to take that up with his attorney at the  
20 appropriate time, which may be at any point Your Honor chooses us to  
21 do that.

22 MJ: Well. Because when we recess tonight would be a good time--  
23 ---



1 CDC [Mr. Swift]: His attorney represented to us yesterday it  
2 may change. His attorney represented to us as he represented in his  
3 letter which we attached after talking to him that yes, he would  
4 exercise his right.

5 MJ: Okay. So it sounds like that motion is not yet ripe. Well  
6 I'm going to take the Article 5 status determination motion under  
7 advisement. That will take a good deal of work.

8 Apart from this witness production--for some reason I didn't  
9 bring with me the motion for access to compel access to these  
10 witnesses. We kind of have discussed it a little bit.

11 Is the government prepared to respond to that independently  
12 of the witness production motion which is discussed? Do you have an  
13 extra copy? Thank you.

14 **[Mr. Swift handed the document to the military judge.]**

15 MJ: Once again, this motion was served this morning, and I'm  
16 not sure if the government has had enough time and opportunity to  
17 respond to it. You're looking at it as if it's something that you're  
18 not fully prepared to take up tonight.

19 PROS: Judge, I think in all honesty our discussion that we just  
20 had I think incorporates a lot of our responses to this particular  
21 motion as well. What I would like to do is to again just address  
22 briefly when I find the list, and I believe I understand that the  
23 five are other than the direct family members which the attorney for

1 the defense recently cited. If I could just have a moment, I believe  
2 I'll be prepared to respond. Thank you.

3 **[Pause.]**

4 PROS: Your Honor, at this time the government is prepared to  
5 respond to the defense motion for access of the five detainees. Your  
6 Honor, would you request that I take the lectern?

7 MJ: No, I'm happy to have you argue from there, if you like.

8 PROS: Thank you, sir. Just reviewing briefly the defenses  
9 motion I've noted again for the record that the request has been made  
10 for access to Khalid Sheikh Mohammed, KSM same individual, Ramzi Bin  
11 al-Shibh, Abu Faraj al Libi, and Abdul Rahim al-Shargawi. These--let  
12 me take the first three and I believe a response that was previously  
13 given by my co-counsel would be the response that we would stand on  
14 as well for purposes of the access motion. That is, in the first  
15 instance the defense has made no showing as to what material  
16 information that these detainees would provide.

17 Your Honor, asked the rhetorical question a moment ago  
18 about how would they know what helpful information is present were  
19 they not allowed to interview these detainees in the first instance.  
20 And my response, Your Honor, is they are sitting with their client  
21 who would be able to provide them at least with a minimal summary of  
22 information that he believes would be helpful in determining this  
23 issue.

1           Now I don't know how long defense has been representing Mr.  
2 Hamdan, but certainly during that period this subject must have come  
3 up despite that additional--despite time, there is no summary here  
4 that we can lay our hands on which would indicate how they believe he  
5 is going to be helpful in what we've all agreed is not a trial, but a  
6 jurisdictional hearing.

7           Additionally, these individuals are high-value detainees  
8 and high-value detainees--and the existence of the high-value  
9 detainees was announced on public television by President Bush at the  
10 time that the 14 high-value detainees arrived in Guantánamo Bay.  
11 That of course is all public knowledge. These first three  
12 individuals are those individuals. In order to access those  
13 individuals, a person must be read into one of the most secure,  
14 limited special access programs available. I will state for the  
15 record, despite being the deputy chief prosecutor, I have never  
16 spoken or had access to a high-value detainee.

17           Dealing specifically with the fourth individual who would  
18 be Abdul Rahim al-Sharqawi, and this would be I believe that defense  
19 counsel referred to him as "the facilitator." He is known by the  
20 commission's community as "Riyadh, the facilitator." And once again  
21 for that particular initial showing I believe they could count on  
22 their client to provide some assessment as to what helpful

1 information with regards to jurisdiction that Mr. Sharqawi could  
2 provide.

3           Now our offered to stipulate in that particular case, Your  
4 Honor, was not to avoid his presence. Our offer to stipulate was in  
5 order to provide a means to access the court with the information  
6 that may be the most helpful. Because if there is helpful  
7 information to be found in this case, there is certainly surrounding  
8 those pieces an enormous amount of exculpatory evidence.

9           With regard to--and I know Mr. Boujaadia is not on this  
10 list I would assume that additionally they would request access--I'm  
11 sorry, it is previously on page 4. With regard to Mr. Boujaadia, we  
12 are somewhat constrained at this point by the, what I would call  
13 "unusual"--not to be interpreted as improper in any way--but the  
14 unusual development of that particular detainee's habeas counsel who  
15 was present in discussing commission issues. And I believe that  
16 simply our ethical responsibilities would require us to ascertain and  
17 discuss with all parties his particular standing, his particular  
18 wishes, with regard to seeking testimony both helpful potentially and  
19 potentially harmful to the defense. Our assertion would be both  
20 ways.

21           MJ: So it sounds like you're saying you can't really grant  
22 access to this witness, or I can't grant access to this witness over

1 the wishes of his habeas counsel who may oppose access in any event.  
2 Is that what you're saying?

3 PROS: That would be correct. And I think we can resolve that,  
4 but we would need a bit of time to sit down with him.

5 MJ: I think we will just defer the issue of this Mr. Boujaadia  
6 for the present.

7 PROS: Yes, sir. So I think, Your Honor, that concludes the  
8 individuals who are detainees, and once again we have set out the  
9 reasons why we believe that----

10 MJ: Did you address number six, Mr. Al-Sharqawi?

11 PROS: Yes, sir. That was the individual who I refer to as  
12 "Riyadh, the facilitator."

13 MJ: Oh, I beg your pardon. Okay then Mr. al Libi--okay, I am  
14 with you now, 2, 3, 4, 5, 6. Okay.

15 PROS: Let me just say as an additional matter. My prosecution  
16 team speaks often with the defense, and I believe we have a very  
17 cordial relationship and we will continue to do so. And when they  
18 make requests with regards to evidence, access, et cetera, we  
19 certainly comply as promptly and within the dictates of the law as we  
20 can.

21 MJ: Very good. Very good

22 DC: Your Honor, if I may just briefly. First of all--and I'll  
23 just try to go down the list with respect to these witnesses. With

1 respect to Khalid Sheikh Mohammed. According to the unclassified  
2 sections of Mr. Mohammed's Combatant Status Review Tribunal, he goes  
3 through in great detail in claiming responsibility for virtually  
4 every terrorist attack that al Qaeda is alleged to have committed in  
5 the past 15 to 20 years. And so our position is that the government  
6 has certainly alleged that Mr. Hamdan at least has conspired to  
7 commit violations of the law of war with as charged senior members of  
8 al Qaeda, Your Honor.

9           We have here on the island some of the senior members of al  
10 Qaeda who have in their CSRT's confessed or admitted to planning some  
11 of these acts, the murder of civilians, and various violations of the  
12 laws of war. Mr. Mohammed has also claimed to be the head of al  
13 Qaeda's military committee. He would be in a position to testify as  
14 to whether Mr. Hamdan is in fact a member of al Qaeda and  
15 specifically whether or not he is part of this al Sulbah which  
16 Professor Williams will discuss. This hard-core faction of al Qaeda,  
17 not hangers on, not drivers, not pilots, not cooks, not farmers, but  
18 these dedicated terrorists. And that's central to the issue that we  
19 are here to discuss today, not only for the trial, but whether or not  
20 this court can even -- even has jurisdiction over Mr. Hamdan, whether  
21 he falls into this category alien unlawful enemy combatant.

22           Mr. bin al-Shibh who is also on the list is one of Khalid  
23 Sheikh Mohammed's lieutenants and again would be privy to this sort

1 of information. The 20th hijacker who was replaced, according to the  
2 trial of Zacarias Moussaoui which again is not speculative it is  
3 recorded, he would be in a position to know. I mean these are the  
4 people that are planning some of the acts the laws of war--violations  
5 of the law of war that Mr. Hamdan is alleged to have conspired. And  
6 this court could gain jurisdiction over Mr. Hamdan by his conspiracy  
7 to violate the laws of war.

8 With respect to Mr. al Libi, Your Honor, if I can for a  
9 second publish something to you, but apparently this pad is not  
10 working. If I may just have a moment, Your Honor.

11 MJ: Yes.

12 DC: If I can publish that to you, Your Honor, and to the  
13 prosecution.

14 MJ: Please.

15 **[The court reporter published the document as requested.]**

16 DC: This is an excerpt of Mr. al Libi's CSRT transcript and you  
17 will see the highlighted section in there. Individuals wanting to  
18 fight in Afghanistan were required to be sponsored by an al Qaeda  
19 member, and to be interviewed then by Mr. Libi to verify that they  
20 are bona fide. So he is the filter, if you will, for those  
21 Mujihadeen fighters who are wanting to go into Afghanistan and to  
22 potentially perform some of these--he is the filter for those  
23 fighters that want to go into Afghanistan and potentially serve as

1 enemy alien unlawful combatants. The very issue that we are here to  
2 discuss today. He is in a position to know as the filter, did he sit  
3 down with Mr. Hamdan and approve his service in Afghanistan as a  
4 member of al Qaeda to fight as an alien unlawful enemy combatant.

5 That's the government's evidence. That section is from the  
6 recorder presenting evidence to the Combatant Status Review Tribunal.  
7 This is not speculative, Your Honor. These are publicly available  
8 documents. We believe that we should be allowed to sit down with  
9 these individuals.

10 With respect to Mr. Sharqawi, who has been referred to as  
11 "Riyadh, the facilitator." We can get into specific details that  
12 have been provided to us by the government in a closed session, but  
13 we believe that he would have information specific to Mr. Hamdan as  
14 to his role or lack thereof in al Qaeda.

15 In short, Your Honor, the government has in its possession  
16 the senior leadership or most of the senior leadership of al Qaeda.  
17 Mr. Hamdan is alleged to be a member of al Qaeda, to have conspired  
18 with that senior leadership to commit violations of law of war. Who  
19 can tell us whether or not that is true, and we certainly should have  
20 access to those witnesses.

21 As the Supreme Court said in *Chambers v Mississippi*, "few  
22 rights are more fundamental than that of an accused to present  
23 witnesses in his own defense," and certainly we should have access to



1 these witnesses and then, if they have relevant information--we  
2 believe that they do based upon our motion and the evidence that we  
3 have in our possession. We should be entitled to speak with them and  
4 to produce them. And, of course, Your Honor, you can immediately  
5 jump to production. I think it would be more prudent to allow us to  
6 go interview these witnesses. They are on the island. We could do  
7 that today, this evening, and go and speak with some of these  
8 witnesses.

9 Again Geneva Article 105 guarantees us the right to access  
10 and to produce witnesses and R.M.C. 701 again guarantees us the right  
11 to access witnesses. Few rights are more fundamental, Your Honor,  
12 and that is what we seek is the right to access witnesses and to  
13 present Mr. Hamdan's defense. If the court has no further questions  
14 that concludes my argument.

15 MJ: I don't think I have any questions about this motion.  
16 Colonel?

17 PROS: Yes, sir, if you'll permit me just a moment in brief----

18 MJ: A moment in rebuttal?

19 PROS: Yes, sir, just briefly.

20 MJ: Well, let me say this. We have been on the record almost 2  
21 hours now, so I'm getting ready for a recess. So why don't you give  
22 me your rebuttal and I'll give the defense the last word, if they  
23 want respond to that and let's take a break, shall we.

1       PROS: I think counsel in this case has pointed out what the  
2 government contends and that is that the high-value detainees are in  
3 fact the worst of the worst. And it's true that we have charged Mr.  
4 Hamdan, from looking at the chart sheet, with the offensive of  
5 conspiracy. We have charged two different theories of conspiracy and  
6 whether or not a certain *mens rea* will be attributed to Mr. Hamdan or  
7 to any of those high-valued detainees is going to be a question of  
8 fact. It is going to be brought out in the trial because the essence  
9 or the existence of a conspiracy is a trial issue.

10           We are not prepared to go forward in this hearing and prove  
11 the ultimate issue in the case, that's to be determined by a trial in  
12 front of members; what we are prepared to do and what the parameters  
13 are of the hearing that you ordered, Your Honor, is to prove that the  
14 detainee is, Mr. Hamdan, is an alien unlawful enemy combatant; which  
15 is strictly a jurisdictional issue.

16           Now simply to say that the defense has a theory of how one  
17 joins al Qaeda and then states to you this is the only way one can  
18 join al Qaeda, well that's not been proven to the court and then  
19 having built this so-called "straw man" bootstraps on there, that the  
20 only ones that would know how that happens are high-value detainees,  
21 puts only to say the cart before the horse. Because what first must  
22 be proven is that that is the only way, and we would disagree. We  
23 will show the court, and we anticipate showing the court that there

1 were at least one other way if not several other ways one could be a  
2 member of al Qaeda and in this particular case, Mr. Hamdan falls into  
3 that particular category.

4           Now, what I would submit to this court is that what the  
5 defense is entitled to and this would be their privilege under the  
6 M.C.A. and under the controlling authority is to have helpful and  
7 material evidence and there is no showing at this particular point.  
8 And once again while they sit with the best source of that, who is  
9 their client, who the government alleges was the driver, bodyguard,  
10 personal assistant etc. of the head of the al Qaeda organization,  
11 UBL. No showing whatsoever at this point that there is any helpful  
12 exculpatory or any information that would defeat jurisdiction in this  
13 matter. Thank you.

14         MJ: Okay. Let me turn to--oh, I'm sorry I promised you the  
15 last word, if you have something you haven't already said?

16         DC: I believe so, Your Honor, if I may take just a moment. If  
17 Mr. Hamdan is in fact a terrorist who is associated with these so-  
18 called high value detainees, he is then an unlawful enemy combatant.  
19 They are in the position to say, he could be potentially an unlawful  
20 enemy combatant I will say because they have engaged in violations of  
21 the law of war and would be in a position to describe Mr. Hamdan's  
22 activities; if any at all in these violations.

1           Again Professor Williams is going to go into great detail a  
2 little bit most likely tomorrow now, that there are these al Qaeda  
3 fact fighters who engage in outside activities. These al Sulbah and  
4 then there are fighters who may have associated with Usama bin Laden,  
5 but who fight with conventional weapons in conventional battles in a  
6 conventional manner and it is key to have these individuals who we  
7 know are part of these arguably unlawful enemy combatants to come in  
8 and say, "What do you know with respect to Mr. Hamdan?"

9           We know that certainly Mr. al-Libi who was betting those  
10 fighters is certainly in a position to say, "That was a guy that I  
11 sat down with or he wasn't a guy that I sat down with he's just a  
12 driver." Because you're not an alien unlawful enemy combatant if  
13 you're driver or a farmer working for Mr. bin Laden on one of his  
14 farms. Hamdan has consistently in his statements asserted that he is  
15 in fact a driver. He has admitted in Federal District Court to  
16 driving Mr. bin Laden around but nothing more than that, Your Honor.

17           So it is critical for this determination--for this hearing  
18 to determine whether or not he is in fact an alien unlawful enemy  
19 combatant and these witnesses will be critical to that, to the issue  
20 before this court.

21           MJ: It is getting towards the end of the day I don't know, we  
22 talked briefly I guess about how long the government's evidence would  
23 take to present and I'm thinking three or four hours is what your----

1           PROS: That would be correct, Your Honor.

2           MJ: ----expecting.

3           PROS: Probably closer to three, but then as I noted the

4 additional videotape which is going to push it perhaps even a little

5 bit beyond four hours.

6           MJ: Okay. Well, I guess I am inclined to start that in the

7 morning rather than to try to press into it tonight. I don't know

8 about the logistical arrangements by which Mr. Hamdan is brought to

9 the courtroom and people who are in the audience can get here. Can

10 we start at 8 o'clock in the morning, or is that unreasonable?

11          PROS: I don't see a representative, Your Honor, from the group

12 that would normally give us the thumbs up on that.

13          MJ: I know that there are ferry schedules involved and----

14 CDC [Mr. Swift]: I can be here.

15          MJ: Who said that?

16 CDC [Mr. Swift}: I can be here, sir.

17          PROS: This would be the detainee type staff.

18          MJ: I'm getting a signal of nine; probably 9 o'clock is the

19 earliest we can----

20          PROS: One moment, Your Honor, please. Your Honor, for the

21 record, I have just been informed that we can have Mr. Hamdan present

22 by 0800.

1 MJ: Okay. Well, someone stuck their hands in the door and said  
2 nine, so why don't we plan to start at nine apparently there are  
3 other missing pieces that we don't----

4 PROS: Yes, sir.

5 MJ: ----fully comprehend. For purposes of the motion to  
6 conduct an Article 5 hearing, I want reserve ruling on that motion  
7 but because were going to begin in the morning taking evidence on the  
8 motion, I will permit the defense to offer evidence that Mr. Hamdan  
9 may have been a civilian accompanying the armed forces or from one of  
10 the last three categories of the Geneva Convention. And I will  
11 decide later whether the Geneva Convention applies in what I will use  
12 that evidence in determining his entitlement to prisoner of war  
13 status or not. I'd like it to be clear that I need to research that  
14 issue, but since we're here taking evidence it is clearly the time to  
15 collect the evidence that may ultimately be relevant if I decide that  
16 the defense is correct.

17 With respect to the protection of witnesses, I want to  
18 offer a partial ruling also before we recess for the night. The  
19 government having conceded that Professor Williams, I think it was,  
20 is relevant and necessary with that issue that request is not an  
21 issue. With respect to witnesses 2, 3, and 4 that request is denied.  
22 It's denied on the grounds that R.C.M. 703 requires a witness request  
23 to be submitted in time reasonably, sufficient in advance of any

1 hearing to permit the witness to actually be produced for that  
2 hearing. And that rule expressly authorizes the court to deny any  
3 request for the production of witnesses that is not timely filed. In  
4 this case the motion to Dismiss for Lack of Jurisdiction was granted  
5 on June 4, 2007. The government filed a motion for reconsideration  
6 of that ruling and I agreed to reconsider the issue of jurisdiction  
7 over the accused on 17 October. On the 18th of October, I set this  
8 hearing for 9 November and on 24 November I already granted one  
9 defense request for a continuance of the date from 9 November to 5  
10 December.

11 On 24 October the court required the parties to disclose  
12 their witness lists, their documentary evidence, and to request  
13 production of witnesses for this hearing not later than the 20th of  
14 November. The courts sense is that, that not later than date was  
15 clearly the final date for such disclosures; but did not relieve the  
16 defense of her complying with rule 703 to submit its witness requests  
17 in sufficient time to actually permit these witnesses to be produced  
18 at this hearing.

19 With respect to these witnesses the issue, the obstacle to  
20 the production, is not distance or location in a faraway country, but  
21 the security obstacles that have to be overcome before either party  
22 can talk to these people or call them as witnesses----

1 CDC [Mr. Swift]: Your Honor, may I address that briefly, I  
2 understand your findings but I would like to address that the  
3 security requirement was something learned of today. That were  
4 absolutely unaware that you had to be read into a program. We did  
5 not know that they were on the island. In October we asked to  
6 interview them and to have that permission we were not told at that  
7 time by the government; we need to be read in to a program or any  
8 other requirements in fact what we never got was an answer that we  
9 couldn't interview them. And it strikes me extraordinarily difficult  
10 on how we will be timely when the rules are unknown to us on what it  
11 is we need do for a witness on the island. In other words, we get to  
12 the hearing and find that we haven't complied with a rule that we  
13 didn't know existed.

14 MJ: Okay----

15 CDC [Mr. Swift]: How is that in the interest of justice?

16 MJ: Well, it is in the interest of justice that you should have  
17 started the process of getting these witnesses long before last week  
18 that's basically where I'm at. With respect to witnesses 7, 8, and  
19 9, my ruling is the same these witnesses are you located in Yemen.  
20 There's simply no possibility that these witnesses could have been  
21 produced when they were requested only last week. There's a table I  
22 think it is in chapter 16 of the Regulations for Trial by Military  
23 Commission, that suggests lead times for obtaining the presence of



1 witnesses at Guantánamo Bay and suggest 90 days lead time for non-  
2 U.S. citizens for his ability to enter the United States is  
3 questionable.

4           So with respect to those six witnesses, the request to  
5 compel their production is denied. With respect to the witnesses in  
6 Yemen if the defense wants to call them and present their testimony  
7 telephonically I would be happy to allow that absent some other  
8 objection. With respect to witness number 5 the one whose name----

9           CDC [Mr. Swift]: Boujaadia.

10          MJ: For whom immunity is in doubt, I will defer a ruling on  
11 that because it appears that it may not be an issue. With respect to  
12 the witness number seven, the motion is also denied because I don't  
13 believe it is relevant and necessary to have his testimony with  
14 respect to the period of 1995 to 1999 only.

15          With respect to witness number six, I will reserve ruling  
16 on the motion to compel production, but I will grant the motion for  
17 access. I think the defense should be able to interview this witness  
18 and see what he has to say and I think they're showing it's adequate  
19 based on what they know and what they've been able to gather so far.

20          CDC [Mr. Swift]: Your Honor, in view of your ruling a start  
21 time of 9 o'clock given what I know of the camp unless an exception  
22 is made on visiting hours at the camp and in fairness to the JTF;  
23 perhaps we could consider a 12 o'clock start time because they're

1 visiting hours have ended for today and they won't resume or open  
2 until tomorrow morning till 9 o'clock. Maybe if we get an exception  
3 we can get out there, but I would make--draw the courts attention to  
4 the normal protocol having visited many times is to visit sometime  
5 between 9 and 6 o'clock during the day because of the security  
6 concerns and everything involved.

7 MJ: Well, that's an issue, you know I was just looking for --  
8 are you missing one of your defense team? Ms. Prasow. Once again  
9 bless your heart I didn't see you all day long.

10 CDC: [Mr. Swift]: Difficulties we will meet----

11 DC: I would be happy to switch with her, Your Honor.

12 CDC [Mr. Swift]: Our difficulty is that he speaks Arabic and  
13 our translator to facilitate that interview is sitting right here and  
14 we have no alternative in that--at least on person who's properly  
15 cleared to go in and do it and we note that Mr. [REDACTED] has a secret  
16 clearance, would be clear to do it so while I would normally agree  
17 that--we have a large team and if he spoke English it would be an  
18 easy solution----

19 MJ: To send one of your defense team over there to do  
20 interview.

21 CDC [Mr. Swift]: Yes, but unfortunately it would----

1 MJ: Okay, well let me ask the government; are you in a position  
2 to a represent whether an accommodation could be made so that the  
3 defense can interview this witness tonight.

4 PROS: I will ask.

5 MJ: Okay.

6 PROS: I can't represent either way but I can ask.

7 MJ: Well, we may be here late tomorrow night or Friday morning.  
8 I understand that your flight is scheduled to leave Friday morning,  
9 but maybe that can be pushed back a little bit. I'll adjourn the  
10 court for tonight and wait to hear about the interview. I think 12  
11 o'clock might be a little bit late. I don't how long you'll need to  
12 ask the relevant questions. I think we get start at 1030 or 11 go  
13 through lunch or something like that. So can you make these calls  
14 tonight and come see me in chambers before we leave for the evening?

15 PROS: Yes, I will and Your Honor, if what can make arrangements  
16 for tonight would it be possible for us to start at the normal time  
17 tomorrow?

18 MJ: Yes. I don't know what all the moving pieces are.

19 PROS: Okay, sir.

20 MJ: But if we can--what do you mean the normal time eight?

21 PROS: I think he'd said nine.

22 MJ: Nine, yes. If we can make arrangements tonight we can  
23 start at nine, I'd like to start at nine because it sounds that we

1 have four hours of government testimony and then 1, 2, and 3 perhaps  
2 of defense testimony and argument----

3 CDC [Mr. Swift]: That would be accurate, Your Honor.

4 MJ: So, if you can make those arrangements tonight----

5 PROS: Yes, sir.

6 MJ: That will help us get started earlier in the morning.

7 Anything else that we need to address this evening?

8 CDC [Mr. Swift]: One part, Your Honor, I understand in your  
9 ruling that the witnesses in question high-value will not be produced  
10 for tomorrow's hearing. Our overall motion for access to be able to  
11 interview at some point is still pending before this court.

12 MJ: Yes. And I think the trial counsel raised that issue when  
13 he talked about the fact that at trial they might be relevant  
14 witnesses when the actual issue is performed----

15 CDC [Mr. Swift]: So as we don't get caught on that in the  
16 future we would like to dispose of that motion if possible during  
17 this time while were on the island understanding that you may not be  
18 able to rule on it.

19 MJ: Well, that would be----

20 CDC [Mr. Swift]: So that we don't find ourselves having failed.

21 PROS: I think that would be very difficult that might take some  
22 coordination that we simply can't----

23 MJ: ----to resolve the issue?

1       PROS: Yes, sir. Now, I'm not saying we can't work towards a  
2 resolution, but I don't think that we can marshal the necessary, let  
3 me call it information, that would be necessary for you to make a  
4 well-informed decision on this matter.

5       MJ: Okay. Let's do that and we will revisit this issue again.  
6 It may be that we just had to take this up the next time that we  
7 reconvene for motions if we get to that point. Courts in recess  
8 until tomorrow morning at a time to be determined.

9       **[The R.M.C. 803 session recessed at 1801, 5 December 2007.]**

10                               **[END OF PAGE]**

11

1 [The R.M.C. 803 session was called to order at 0919, 6 December  
2 2007.]

3 MJ: The court is called to order. All parties present when the  
4 court last recessed are once again present. Check the defense  
5 counsel make sure you're not hiding behind the pillars there. Looks  
6 like everyone is here this morning.

7 The court is ready to hear evidence on the motion with  
8 respect to jurisdiction. Is the government ready to proceed?

9 PROS: The government is ready to proceed, Your Honor.

10 MJ: Please call your first witness.

11 CDC [Mr. Schneider]: Your Honor, 30 seconds--I don't believe  
12 will be controversial. The defendant makes a motion under Rule 615  
13 to exclude witnesses until after the testimonies have been concluded  
14 and the witness excused. My understanding is that it may be a joint  
15 motion or at least is not proposed.

16 PROS: That should apply to all witnesses, correct.

17 CDC [Mr. Schneider]: Thank you. We would ask that an order be  
18 entered at this time.

19 MJ: Are there witnesses in the courtroom that we intend to call  
20 later in the day?

21 CDC [Mr. Schneider]: I don't believe so. We just wanted it a  
22 matter of record.

1           PROS:  Additionally, Your Honor, we have video feeds that go out  
2   from this building and we would request that no witness have access  
3   to the video feeds either.  I think that would defeat the purpose of  
4   not having witnesses in the courtroom.

5           MJ:  Okay.  Without opposition from the government, the order is  
6   entered that witnesses who are expected to testify will be excluded  
7   from the courtroom.

8           CDC [Mr. Schneider]:  And we're on the honor system in the sense  
9   that we both instructed our witnesses and we don't expect any court  
10  supervision for compliance on that.

11          PROS:  That would be correct, Your Honor.

12          MJ:  Very good.

13          PROS:  Judge, if I could just briefly prior to calling my first  
14  witness make one brief statement of clarification regarding our  
15  colloquy yesterday concerning the CSRT process as being a substitute  
16  for the Geneva Convention IV and V articles.  Essentially we have  
17  stated our position in our brief and stand by what's in our brief.  
18  My footnote to you though is just the recognition that your ruling,  
19  ultimately the ruling by the Court of Military Commissions Review,  
20  obviously, slightly altered our understanding of the law at that  
21  point and would have some obvious impact on the system.  So just to  
22  make it clear what we do stand by what we have in our brief regarding  
23  that particular issue.

1 MJ: Very good.

2 PROS: We are prepared to call our witness.

3 MJ: Okay. Thank you.

4 CDC [Mr. Swift]: Your Honor, I have one motion before we begin  
5 this that I would like to bring to the attention of the court. We  
6 would like to challenge the female translator's expertise and ability  
7 to translate for this proceeding.

8 MJ: Okay.

9 CDC [Mr. Swift]: If I might approach the podium briefly?

10 MJ: You may.

11 **[The civilian defense counsel, Mr. Swift, moved to the podium.]**

12 CDC [Mr. Swift]: At the outset we have no objection to the male  
13 translator. It's our belief that his translation was excellent  
14 yesterday, and we understood that some of the issues talked about  
15 were legal in nature and somewhat difficult. Nevertheless, during  
16 her translation there were large gaps which were un-translated for  
17 periods. She consistently speaks in a Lebanese dialect as opposed to  
18 Yemeni Arabic, or Modern Standard Arabic, which all Arabs would  
19 understand, or Yemeni my client would understand, which creates more  
20 significant understanding problems.

21 She consistently uses English during her translation. She  
22 consistently mistranslates or does not translate sections of court  
23 proceedings. Just to give you an example, when we were talking about



1 the charges against the defendant, including that the defendant was  
2 the driver and bodyguard of Usama bin Laden----

3 MJ: I'm sorry, I think it's fair to say that you are going too  
4 fast now even for the male interpreter, if he happens to be the one  
5 on duty just now.

6 CDC [Mr. Swift]: Including that the defendant was the driver---  
7 -

8 MJ: I'm sorry; and I'm trying to take notes.

9 CDC [Mr. Swift]: Yes, sir.

10 MJ: So, "speaks in English," I think was the last thing that I  
11 wrote down. "Wrong dialect," did you say?

12 CDC [Mr. Swift]: That's correct, Your Honor.

13 MJ: Please go ahead.

14 CDC [Mr. Swift]: The female translator consistently  
15 mistranslates or does not translate all sections of the court's  
16 proceeding. Let me give the court an example. When talking about  
17 the charges against the defendant, including "the defendant was a  
18 driver and bodyguard of Usama bin Laden," was the phrase used in  
19 court. The translation was as follows: "The defendant is charged  
20 with being the chauffeur and lawyer of Usama bin Laden." Now, I  
21 would say chauffeur, there's obviously no difference there, but  
22 "lawyer" and "bodyguard," is substantively different.

1           We don't want to object to yesterday's proceedings. We've  
2 had time to explain to our client what happened and the substance of  
3 the judge's rulings and the effect thereof. But, when we come to the  
4 hearing of witness testimony, Mr. Hamdan is not meaningfully present  
5 if what the witness says is not what's being meaningfully translated.  
6 He will not be able to participate in the hearing, provide us  
7 anything, and in fact it becomes a distraction when Mr. Hamdan is  
8 hearing one thing and thinks the issues are completely different from  
9 what's actually in front of us. Therefore, we object to her  
10 continued translation in this proceeding.

11       MJ: Does the government have a position?

12       PROS: No, Your Honor, we don't.

13       MJ: Have you made any effort to verify or challenge the  
14 defense's assertions about the quality of the translations?

15       PROS: Your Honor, if Mr. Swift is representing to the court  
16 that that's the case, I have no reason to doubt it.

17       MJ: Well, in that case I think I must grant the motion--grant  
18 the objection. This will affect our ability to proceed at the same  
19 pace we had anticipated, because one interpreter acting alone needs  
20 breaks and time to clear his head from time to time. My experience  
21 in the past is that professional interpreters work for about half an  
22 hour, maybe 40 minutes, and then they're expecting to be relieved.

1 So, as counsel present their evidence, if you could keep it in 30 to  
2 40-minute chunks----

3 PROS: Yes, sir.

4 MJ: ----and make sure we don't have any delays for other  
5 purposes; hopefully we'll be able to obtain or receive all the  
6 evidence we need to receive today. Okay?

7 CDC [Mr. Swift]: Yes, Your Honor.

8 MJ: Very well, your motion is granted.

9 PROS: Thank you, sir.

10 MJ: I think I hear a man's voice in the background. I guess  
11 the gentleman that is the male interpreter is on duty now?

12 DEFENSE INTERPRETER: Yes, yes.

13 MJ: Okay, we're ready to receive the first evidence--the  
14 government's first witness.

15 PROS: Yes, sir. At this time the government calls Major [REDACTED]  
16 [REDACTED].

17 MJ: Is there a bailiff that is going to go get your witness for  
18 you? This is the bailiff right here. Do you know where Major [REDACTED]  
19 is?

20 PROS: He is going to be upstairs on the prosecution side.

21 MJ: Would you call Major [REDACTED] to the courtroom, please?

22 BAILIFF: I will, sir.

23 **[The bailiff did as directed.]**

1           PROS: Your Honor, if I could address the court briefly about a  
2 technical issue?

3           MJ: Yes.

4           PROS: We intend to use the Courtroom 21 technology in this  
5 courtroom and apparently I have just been informed that there is a  
6 problem with our ability to control the evidence from our desk, so I  
7 think at this time we need to have the people that are involved with  
8 the technology to free up the controls from the upstairs and return  
9 the manual control back to the desks so we can control the flow of  
10 the evidence.

11          MJ: Okay. I want to be in control of the flow of the evidence.

12          PROS: Yes. Overall for publication, but we can't even initiate  
13 yet because it's locked--the controls are locked.

14          MJ: If the person who has control of the switches could free  
15 them up so counsel at their desk----

16          PROS: Thank you, Your Honor.

17          MJ: ----can work the local machinery that would be nice.

18       **[Sergeant First Class McDonald entered the courtroom to fix the**  
19 **equipment.]**

20          MJ: Thanks, Sergeant McDonald.

21          PROS: Major [REDACTED], if you will please enter the courtroom and  
22 have a seat on the witness stand.

1 MAJOR [REDACTED], U.S. Army, was called as a witness for the  
2 prosecution, was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the prosecutor:

5 Q. State your name, please.

6 A. Major [REDACTED].

7 Q. And what service are you currently employed with?

8 A. I'm in the United States Army.

9 Q. And did you take part in Operation Enduring Freedom?

10 A. Yes, I did.

11 Q. Now, let me direct your attention to a specific date, that  
12 would be the 23rd of November 2001. What was your location on that  
13 date?

14 A. 23 November 2001, I was positioned about 2 to 3 miles east  
15 of the town of Takteh-Pol in Afghanistan.

16 Q. At that time what were your duties?

17 A. At that time I was engaged in combat operations against  
18 Taliban and al Qaeda forces to deny them the area that I had been  
19 assigned to work in.

20 Q. And what was your objective; your geographic objective at  
21 that time?

22 A. My geographic objective at that time was actually to  
23 intersect or interdict highway 4 south of Kandahar and the Kandahar

1     airfield in order to continue on our advance toward Kandahar itself.

2           PROS: All right. At this time, Your Honor, we would like to  
3     publish a map of Afghanistan of the area in question.

4           MJ: I would like to see what you have before we publish it to  
5     anyone else.

6     **[The court reporter published the document to the military judge and**  
7     **all counsel.]**

8           MJ: What do you mean by publish?

9           PROS: To display it to the court.

10          MJ: The court is seeing it.

11          PROS: All right.

12          MJ: Is that what you want?

13          PROS: At this time I'd like to publish it to the witness.

14          MJ: You may.

15          PROS: Thank you, Your Honor.

16     **[The court reporter published the document to the witness.]**

17     **Questions by the prosecutor continued:**

18          Q. Can you see that Major [REDACTED], on your monitor?

19          A. Yes, I can see it.

20          Q. And I would direct your attention to that map and just have  
21     you identify that please, for the court.

22          A. That is the map of Afghanistan.

1 Q. And what other geographic areas does it show south of  
2 Afghanistan?

3 A. South of Afghanistan?

4 Q. Yes, correct. What country is south of Afghanistan?

5 A. Pakistan is south of Afghanistan.

6 Q. All right. And that's depicted on the map as well?

7 A. Yes, it is.

8 MJ: Just a minute. Can the defense see this map? Very good.

9 PROS: Yes.

10 MJ: Please go ahead.

11 **Questions by the prosecutor continued:**

12 Q. Okay, Major [REDACTED] what I am going to ask you to do, and be  
13 very sensitive when you do this. The screen acts as a teleprompter  
14 and if you could please show your position at--or the approximate  
15 location of your force on the 23rd of November 2001.

16 A. By touching the screen?

17 Q. Yes.

18 **[The witness did as directed.]**

19 A. Approximately there.

20 Q. Now----

21 MJ: I'm sorry, when you say "there"----

22 A. Well----

23 MJ: I see a red arrow, and now he has just drawn a line.

1           PROS:  Yes, sir.

2           MJ:  Okay.

3   **Questions by the prosecutor continued:**

4           Q.  All right, and if you could please indicate on the map  
5  exactly where your force was?

6           A.  The map doesn't provide the resolution to do that, it was--  
7  --

8           Q.  Just the approximate location.

9           A.  Right.  South of Kandahar, north of a town of Chaman which  
10  is on the Pakistan-Kandahar border about halfway is the town of  
11  Takteh-Pol and we were--if you go due east of there, approximate 2 to  
12  3 miles that is where my forces were positioned.

13          Q.  And is there a major road which runs north and south  
14  through that particular area?

15          A.  Yeah, highway 4 runs out of Pakistan from Chaman through  
16  Spin Boldak toward Kandahar going from the southeast to the  
17  northwest.

18          Q.  Is there any other major route which runs north and south  
19  through both Pakistan and Afghanistan from Kandahar to Pakistan?

20          A.  No, that is the only major road.

21                                   **[END OF PAGE]**

22



1 Q. And I believe you identified an area called Takteh-Pol.

2 What was--what is Takteh-Pol?

3 A. Takteh-Pol is a small town that sits astride that highway.  
4 It's south of the airport and the city of Kandahar, and north of the  
5 city of Spin Boldak, approximately halfway in between.

6 Q. What specific military value would that town have in your  
7 mission?

8 A. Well seizing that town would allow us to interdict and  
9 sever the line of communication or the road between the town-- the  
10 city of Kandahar and Pakistan.

11 Q. Taking you again to the 23rd of November 2001, what was  
12 your tactical situation at that time?

13 A. The 23rd of November, that day we arrived a few miles  
14 outside the town of Takteh-Pol. That evening we attempted  
15 negotiation with the Taliban who held the town. It was essentially  
16 an unsuccessful negotiation. They used the negotiation ploy to get  
17 us into an exposed position where they ambushed us, and then we  
18 proceeded to be engaged in a fight that lasted until dawn on the 24th  
19 with Taliban forces the rest of that night.

20 Q. When you said you were engaged with Taliban forces, can you  
21 be more specific?

22 A. They encircled the negotiating party and the lead elements  
23 by three sides outside of Takteh-Pol occupying the ridgelines under a

1 flag of truce essentially, and then they opened fire at us at dark.  
2 At that point we returned fire and we were engaged with them the  
3 whole night trying to pull back to a secure position in which we had  
4 to call air strikes throughout the night to secure our position, and  
5 they also attempted to outflank us a number of times.

6 Q. Would it be correct to characterize your activities as  
7 being engaged in combat?

8 A. That would be correct.

9 Q. Did your force sustain any casualties?

10 A. The Americans underneath me did not sustain any casualties,  
11 but a number of my anti-Taliban forces from the Pashtun tribes they  
12 did sustain some wounded casualties.

13 Q. How many Afghani forces were under your command?

14 A. At this time approximately 6 to 800 forces or personnel.

15 Q. Were you able to inflict any casualties on the enemy  
16 forces?

17 A. We believe we did. We were able to observe a number of  
18 vehicles being hit and we were able to observe Taliban moving away  
19 from us as we engaged them. However, the next morning we didn't  
20 recover any bodies or anything like that. We did recover a large  
21 amount of equipment.

22 Q. Did you take any prisoners?

23 A. That night we took approximately 35 Taliban prisoners.

1 Q. And how were those particular Taliban dressed?

2 A. The Taliban were dressed in standard Pashtun turban that  
3 was black which was typical of the Taliban.

4 Q. What else were they wearing?

5 A. They were wearing pretty much Pashtun garb which isn't  
6 consistent, but it's generally the same--earth tones. But the  
7 consistent thing was the black turban.

8 Q. Were they wearing anything that you would describe as a  
9 uniform, a consistent uniform that we would recognize?

10 A. I would not say that they had distinctive unit insignia or  
11 name, rank or anything like that on uniforms, no.

12 Q. How were you able to identify them or separate them from  
13 let's say any other Afghanis that might have been in the area?

14 A. Typically the Afghanis in the area would wear a turban that  
15 had tribal affiliation. The Taliban typically didn't have a turban  
16 with tribal affiliation; it was just a black turban. Everybody in  
17 Afghanistan knew that that meant that they were Taliban. We knew  
18 that meant they were Taliban.

19 Q. On the morning of the 24th, did your force--your American  
20 forces plus your loyal Afghani forces move into Takteh-Pol?

21 A. Yeah, on the morning of the 24th we moved into Takteh-Pol;  
22 that's correct.

23

1 Q. And describe how that occurred?

2 A. We repositioned that morning on a ridge overlooking Takteh-  
3 Pol and then we began to in three prongs, north and south--just  
4 slightly north and south and right at the town in three columns  
5 toward the town and we rapidly seized the town and we moved ATF  
6 forces--what we call anti-Taliban forces--rapidly swept through the  
7 town and secured it.

8 Q. Now, do you recall what Takteh-Pol looked like visually?

9 A. Yes, I do recall what it looks like.

10 Q. And if you could please explain to the court your visual  
11 impression of Takteh-Pol?

12 A. Takteh-Pol like a lot of Afghan towns was a lot of mud huts  
13 or mud-type buildings, adobe-type buildings that were along the side  
14 of the highway on both sides. There were shops in some areas. Most  
15 of the huts appeared run down, but they actually were lived in or  
16 were being used at the same time. It is very third world, very run  
17 down kind of place.

18 Q. Approximately how many distinctive buildings do you recall?

19 A. There was one particularly distinctive building that was  
20 the one we stayed in. It wasn't a mud hut, it was actually the only  
21 building that wasn't and it had a stone façade on it and it was a  
22 fairly established building. That's the one that we used as our  
23 headquarters.

1 All the other buildings were kind of varying sizes but they  
2 were all built out of mud for the most part, and then there was also  
3 a line of shops, or a long building that had a lot of stalls on it,  
4 and they had some plumbing in front of it.

5 Q. Were there any Afghani civilians present when you entered  
6 Takteh-Pol?

7 A. At the time that I entered Takteh-Pol I didn't see any. It  
8 was likely that they were either hiding or had left the town due to  
9 the fighting.

10 Q. Were there any anti-U.S. forces: Al Qaeda, Taliban, or the  
11 like present in Takteh-Pol when your force entered?

12 A. No. We had found out that they had left that morning just  
13 we were starting to come toward the town.

14 PROS: Now at this time, if we could please have shown to the  
15 judge, government exhibit number one--Prosecution Exhibit number 1.  
16 **[The court reporter published the exhibit to the military judge and**  
17 **all counsel.]**

18 PROS: Your Honor, this particular exhibit--this particular  
19 photo has been shown to the defense.

20 DDC: Two voir dire questions, Your Honor. Assuming that it's  
21 about to be offered.

22 MJ: Two voir dire questions? I think he's going to lay his  
23 foundation now. Why don't we let him do that? Right now who is

1     seeing this picture, just me? Can counsel see this?

2             DDC: Yes.

3             APROS: I see it as well.

4             MJ: Why don't you go ahead and lay your foundation for this  
5 picture.

6     **Questions by the prosecutor continued:**

7             Q. All right. Were photographs taken on the 24th of November  
8 2001?

9             A. Yes, they were.

10            Q. And have you seen the photographs, to include the  
11 photograph which we have marked as Prosecution Exhibit 1 for  
12 identification?

13            A. Yes.

14            Q. It was the one that we showed you yesterday-- Prosecution  
15 Exhibit 1.

16            A. Okay.

17            Q. That particular photograph, does that fairly and accurately  
18 depict the scene as you recall it in Takteh-Pol on November the 24th  
19 2001?

20            A. Yes.

21            PROS: Your Honor, at this time I would like to enter this into  
22 evidence.

23            DDC: No objection.

1 MJ: Very well. Without objection, Prosecution Exhibit 1 is  
2 admitted into evidence. The words "for identification" may be  
3 stricken.

4 **Questions by the prosecutor continued:**

5 Q. Okay. Now directing your attention to Prosecution Exhibit  
6 1, if you could identify more specifically what we are looking at.

7 A. I don't have the picture yet.

8 Q. I know.

9 **[The court reporter published PE 1 to the witness.]**

10 A. There we go. What you are looking at in this picture is--  
11 this is actually from the one only established building; like I said,  
12 a stone façade and the little stone courtyard around it. In the  
13 front you can see the typical kind of buildings around Takteh-Pol,  
14 numerous people walking around, the terrain. You can actually see  
15 part of the highway right there on the right side and in the  
16 background, five puffs of smoke are where 107 millimeter rocket  
17 rounds are impacting.

18 Q. When this photograph was taken, where were you located in  
19 proximity to the view that we are observing on Prosecution Exhibit 1?

20 A. It was probably likely that I was probably standing right  
21 next to the person taking this picture or in this very building where  
22 this picture is being taken from.

1           Q.   Now, I believe that you have just testified that visible on  
2 the screen are certain puffs of smoke; is that correct?

3           A.   That is correct.

4           Q.   If you could go ahead and just lightly without running your  
5 finger across the screen, just lightly touch what you are talking  
6 about on Prosecution Exhibit number 1.

7           A.   **[Points at PE 1 on his screen.]** These puffs of smoke are  
8 where 107 millimeter rocket rounds are impacting that were being  
9 fired at us.

10          Q.   About what time of the day did this occur on the 24th of  
11 November?

12          A.   This probably occurred sometime in the afternoon. I am not  
13 sure when this exactly happened, it's probably later in the  
14 afternoon.

15          Q.   So would it be your testimony then that while you were  
16 present, you guys are actually under hostile fire?

17          A.   Yes, we were under hostile fire.

18          Q.   What is a 107 millimeter rocket?

19          A.   A 107 millimeter rocket is a rocket fired from a portable  
20 rocket--multi-barrel rocket launcher and it's just a rocket that  
21 comes in and blows up to try to kill people and destroy things.

22

23



1           Q.    All right.  Now describe what action you took when you  
2 entered Takteh-Pol?

3           A.    When we entered Takteh-Pol we were--we first entered the  
4 town and we tried to secure it make sure we swept it.

5           MJ:   Major, I'm sorry----

6           WIT:   Yes, sir.

7           MJ:   Everything that you say is being interpreted----

8           WIT:   ----okay.

9           MJ:   ----into Arabic----

10          WIT:   ----I understand.

11          MJ:   ----by a gentleman who is trying to keep up with you.

12 Please slow down just a little bit.  Counsel, maybe you could space  
13 your questions a little.

14          PROS:   Yes, sir.  Thank you.

15 **Questions by the prosecutor continued:**

16          Q.    Upon entering Takteh-Pol, what actions did you take?

17          A.    Upon entering Takteh-Pol the first action was to sweep and  
18 secure the town of any Taliban forces that might be in there.  Then  
19 we proceeded to establish checkpoints north and south of the town,  
20 though they weren't--they were actually still in the town at this  
21 point to interdict any traffic going through the town.

22

23

1           Q.    If I could just stop you right there.  When you say you  
2 established checkpoints; what is a checkpoint?

3           A.    A checkpoint is where we would actually stop a vehicle and  
4 search the vehicle and the people in the vehicle and their contents  
5 for any kind of contraband or war materiel or personnel.

6           Q.    What was the situation report at the time about combat or  
7 activities--hostile activities that were going on in that general  
8 region?

9           A.    At the time, Kandahar itself was still controlled by the  
10 Taliban and there were reports of large number of Taliban troops in  
11 Kandahar, as well as to our south in Spin Boldak.  The assessment was  
12 this was going to be the last stand of the Taliban and the Al Qaeda  
13 forces in the region and we were expected--or led to believe that  
14 there would be a very long pitched fight for the city of Kandahar  
15 itself.

16          Q.    I believe you have already testified that there was, in  
17 fact, a pitched fight which occurred on the 23rd regarding your  
18 forces?

19          A.    Yes.  Yes, there was.

20          Q.    Now you indicated that there was a road block--two  
21 roadblocks that were set up.  Would this be on Highway 4 which is the  
22 road that you testified to being the main artery north and south?

23          A.    Yes.

1 Q. Describe how you set up those roadblocks?

2 A. The roadblocks, initially when we first went into Takteh-  
3 Pol were established by the anti-Taliban forces, so procedurally, I'm  
4 not going to say exactly how they were done, but what they would do  
5 is simply stop a vehicle, ask the people to get out of the vehicle,  
6 and then they would search the people and search the vehicle for any  
7 kind of war materiels. At the end of the first day in Takteh-Pol we  
8 had two roadblocks, north and south, but initially it probably was  
9 just one roadblock in the middle of town to begin with.

10 Q. Why would you have one on the north side of town and one on  
11 the south side of town?

12 A. Well the town itself as my forces consolidated into the  
13 town, I wanted to keep the town secure and essentially we did not  
14 want truck bombers or someone or a force infiltrating in the middle  
15 of town, dismounting and attacking us from within the town which was  
16 considered secure at the time. So you want to make sure that anybody  
17 entering the town either from the north or the south are at least  
18 secure and neutralized to the degree that they do not pose a threat  
19 when they are actually passing through the town.

20 Q. Again on the 24th, where there vehicles passing up and down  
21 heading north and south on Highway 4?

22 A. Yes, there were vehicles still driving through the town on  
23 the 24th.

1 Q. With regard to the checkpoints, what were they looking for?

2 I believe you've already said, but if you could reiterate that?

3 A. At the checkpoints we were just stopping and actually

4 looking--actually looking for personnel: Taliban or al Qaeda

5 personnel who may have been trying to get in or out of the area. We

6 were also looking for equipment or any kind of war materiel:

7 weapons, ammunition, those kinds of things.

8 Q. Now in the late morning--early afternoon, did one of those

9 checkpoints stop a vehicle?

10 A. Yes.

11 Q. If you could describe what, if anything, happened?

12 A. We had the vehicle stopped and the occupants in the

13 vehicle----

14 Q. First of all, just tell us what you observed or didn't

15 observe, what you heard or didn't hear?

16 A. I did not observe this vehicle being stopped. As I said

17 before, I was probably likely in this very building where this

18 picture being displayed was being shot, or I was out on a perimeter

19 trying to establish another position. Likely in this building, if I

20 recall. There was a lot of gunfire, there was a lot of excitement

21 with the Pashtun forces I was working with, and there were a lot of

22 people who were upset and we didn't know exactly what had happened.

23 So at that time, we tried to assess what had happened.

1           Q.    How did you conduct an assessment?  You, in fact, were the  
2 commander of this force; correct?

3           A.    Yes, I was.

4           Q.    How did you conduct the assessment?

5           A.    The way I was going to conduct the assessment was I was  
6 just going to walk over there and find out what happened.

7           Q.    Did you do that?

8           A.    I began to walk over there.

9           Q.    How long after you heard the gunfire did you walk over to  
10 the location where the gunfire took place?

11          A.    I can't be certain how long it took me to get there.  There  
12 are a number of reasons for that.  As a commander, I had a lot of  
13 people constantly coming up to me giving me different reports,  
14 telling me different things, there were a lot of issues I was dealing  
15 with.  So, it could have been a 3-minute walk, it could have been a  
16 15-minute walk depending on what I was dealing with on the way there;  
17 but I do remember after the gunfire I was going to the checkpoint to  
18 see what had happened.

19          Q.    Would this be the northern checkpoint or the southern  
20 checkpoint?

21          A.    I would say at this point it might have been the only  
22 checkpoint.  It was in probably the southern part of the town based  
23 on the direction I had to walk.



1           Q.    And taking you back to our brief period when we were  
2 discussing geography, where did the northern portion of Route [sic] 4  
3 go?

4           A.    The northern portion of Highway 4 went to Kandahar.

5           Q.    And that was the area that your situation report at the  
6 time indicated that the last final battle was going to take place; is  
7 that correct?

8           A.    That is correct.

9           Q.    Involving Taliban and al Qaeda forces?

10          A.    Yes.

11          Q.    Now you indicated that you saw an individual being led  
12 away. If you could describe that individual more specifically,  
13 please.

14          A.    I honestly cannot describe him much more specifically other  
15 than he was being secured by a number of anti-Taliban forces and he  
16 was being led away, dragged away, however you want to describe it--he  
17 was being led away and he was being secured somewhere else. I only  
18 got a few seconds to look at him. He was probably several--20  
19 meters, 30 meters away from me at this point. Then I was directed to  
20 look at the vehicles and what was in them and people were explaining  
21 the story to me at the time.

22

23

1       Q.    Let me again--and I apologize for stopping you, but some of  
2   these points I want to make.  You indicate that the individual that  
3   you saw--was this an individual--based on your time spent in country  
4   and based on what you were able to observe, in your opinion, was  
5   either Arabic or a person of Arabic descent?

6       A.    At the time, you know, I was led to believe that.  I didn't  
7   get a good look at him until later.

8       Q.    I understand.  We're talking about at that time.  Now what  
9   actions, if anything, was--the person who was being led away, what  
10  was he doing?

11      A.    He was resisting to some degree, dragging his feet, not  
12  being happy.  He wasn't walking on his own and he wasn't going  
13  willingly where he was being led.

14      Q.    How were you able to conclude that he wasn't going  
15  willingly?

16      A.    Well he had to be led, taken, forcibly moved along to the  
17  place that he was being eventually detained to.

18      Q.    All right.  Then you stated previously that your attention  
19  was directed to something else?

20      A.    Right.  I can't remember who told me, but someone-- either  
21  my translator or one of my soldiers told me, "Take a look at this,"  
22  and they pointed to the back of the vehicle which had two SA-7's in  
23  it.



1 Q. If you could describe the vehicle?

2 A. The vehicle was a hatchback and I remember the hatchback  
3 been raised and the weapons were in there. That's about it.

4 Q. How large was the vehicle?

5 A. It was a small hatchback.

6 Q. How many doors, do you recall?

7 A. Yeah, it was a four-door.

8 Q. And what type or make what is it or what is it comparable  
9 to just so we get the understanding size wise what you're talking  
10 about?

11 A. It was a small hatchback wagon, Japanese make, so it would  
12 probably be a Toyota, or Honda, or something like that.

13 Q. You indicate that the source of concern with whoever was  
14 reporting this to you was there appeared to be, I think you  
15 testified, there were SA-7 rockets in the back of the vehicle?

16 A. Right. That was quite distinctive that there were SA-7's  
17 in there and that's why I was led to that vehicle and said, "look at  
18 this."

19 Q. Have you seen SA-7's before?

20 A. Yes, I have.

21 Q. And, therefore, you were able to determine visually that  
22 they were SA-7's?

23 A. Yes.

1 Q. Were they operational at the time?

2 A. They were just the SA-7 missiles themselves, they didn't  
3 have a launcher unit with them.

4 Q. What is the launcher unit with regard to the missile  
5 itself?

6 A. The launcher unit is a battery and trigger and aiming  
7 device that you attach the missile to so that you fire the missile.

8 Q. Would it be correct to say that what you were observing was  
9 simply the missile inside the tube; would that be correct?

10 A. Right, there is--the SA-7 is transported and the missile is  
11 inside the tube. You just attach that to the launcher unit to fire  
12 the missile, and take the expended round off, put another one on the  
13 same launcher unit.

14 Q. What is the purpose of a SA-7 missile?

15 A. The SA-7's purpose is to engage aircraft and shoot them  
16 down.

17 Q. To the best of your knowledge, who had operational aircraft  
18 in theater at that time?

19 A. The only operational aircraft I was aware of in theater at  
20 that time was the coalition, U.S.

21 Q. Were any of your loyal Afghani forces carrying SA-7 surface  
22 to air missiles?

23 A. No. None of my forces were carrying SA-7's.

1 Q. How do you know this?

2 A. When I first linked up with them I had to inventory all  
3 their weapon systems as best I could and certainly all of the larger  
4 weapons systems. I went through and we looked at all of them,  
5 ascertained the number and the quality of them. Nowhere in there did  
6 we see any kind of SA-7's or any kind of surface to air missile.

7 Q. Would there be any practical reason why any of your forces  
8 would have been carrying SA-7's?

9 A. No, there would be no reason for them to have them.

10 Q. Why not?

11 A. There wasn't any legitimate or considerable air threat at  
12 the time to our forces.

13 PROS: At this time, Your Honor, I would ask that on the viewing  
14 screen to be shown to you would be Prosecution Exhibit number 2 for  
15 identification.

16 **[The court reporter published PE 2 for ID to the military judge and**  
17 **all counsel.]**

18 PROS: Your Honor, all these photographs have previously been  
19 shown to the defense and provided to the defense, I should add.

20 MJ: Very good.

21 **[END OF PAGE]**

22

23

1   **Questions by the prosecutor continued:**

2           Q.   All right.  Let me show you--or let me ask first to lay the  
3   foundation first--the vehicle which you identify as the vehicle that  
4   you saw the two SA-7 surface to air missiles.

5   I believe you have described that vehicle.  Was that vehicle  
6   photographed on the 24th of November?

7           A.   Yes, I believe it was.

8           Q.   And have you had an opportunity to review Prosecution  
9   Exhibit number 2, the photograph of the vehicle in question?

10          A.   Yes.

11          Q.   In that particular photograph, did that comport to your  
12   recollection of how the vehicle appeared on the 24th of November  
13   2001?

14          A.   Yes, it does.

15          PROS:  Your Honor, at this time I would like to publish to the  
16   court Prosecution Exhibit number 2.

17          MJ:   No objection from the defense?

18          CDC [Mr. Schneider]:  No objection to its admission when  
19   offered.

20          MJ:   Is that what you are doing, you're offering this into  
21   evidence?

22          PROS:  Yes, sir.

1 MJ: Prosecution Exhibit 2 is admitted into evidence without  
2 objection and the words "for identification" may be stricken.

3 PROS: Your Honor, I would ask you to please bear with me as I  
4 transition from old school walking the pages around to figuring out  
5 and becoming comfortable with the new technology.

6 **[The court reporter published PE 2 to the witness.]**

7 **Questions by the prosecutor continued:**

8 Q. Now directing your attention to Prosecution Exhibit 2, if  
9 you can please tell us what we are looking at?

10 A. We are looking at another picture in Takteh-Pol. The  
11 vehicle in the front was the vehicle that we confiscated that had the  
12 SA-7's in it. You see some Afghan warriors there. On the left,  
13 rundown buildings and walls in Takteh-Pol, and the terrain, and some  
14 more smoke plumes in the background.

15 CDC [Mr. Swift]: Your Honor, the translator--I hate to  
16 interrupt--has asked for a break.

17 MJ: I was just about to say the same thing. It has been 45  
18 minutes or so that we have been on the record. How much longer will  
19 your examination of this witness?

20 PROS: It will be approximately 10 more minutes.

21 MJ: Okay, I think we ought to take a break then and let you  
22 complete your examination and go directly into cross after we  
23 returned from a recess.

1 I will ask the interpreter if 15 or 20 minutes will be  
2 enough time?

3 COURT INTERPRETER: Yes, Your Honor.

4 MJ: Okay, there we go; 15 or 20 minutes. We'll be in recess  
5 then until 1020.

6 **[The R.M.C. 803 session recessed at 1000, 6 December 2007.]**

7 **[The R.M.C. 803 session was called to order at 1035, 6 December**  
8 **2007.]**

9 MJ: Court is called to order. All parties present when the  
10 court recessed are once again present.

11 Trial counsel, please continue your examination.

12 PROS: Thank you.

13 Major [REDACTED], I believe at the break----

14 DEFENSE INTERPRETER: He said that there is no sound, there is  
15 no voice going to him.

16 MJ: Does the interpreter hear----

17 DEFENSE INTERPRETER: I hear footsteps.

18 MJ: ----the proceedings in the courtroom?

19 Would you go upstairs and make sure that the interpreter is  
20 sitting at his console and he knows that we are starting again; maybe  
21 he is still on recess.

22 **[The Bailiff departed the courtroom.]**

23 **[Pause.]**

1   **[The Bailiff entered the courtroom and spoke to the military judge.]**

2           MJ:   Okay.  I am being told that there is a technical difficulty

3 with the equipment somewhere.

4           COURT INTERPRETER:  Can you hear me?

5           MJ:  I can hear you speaking English over the speakers in the

6 room.

7           COURT INTERPRETER:  Right.  I am going to check with defense to

8 see if they can hear me as well.

9           MJ:  We are not hearing you in Arabic in the courtroom.

10          DEFENSE INTERPRETER:  We are hearing ourselves.

11   **[Pause.]**

12          DEFENSE INTERPRETER:  No, we can hear you very low.

13          MJ:  Well, this will teach us to take a break, won't it?  Stop

14 using the equipment, it dies on you.

15          DEFENSE INTERPRETER:  We can barely hear you--we can hear

16 ourselves, but not you.  Very low.  Very low.  There, there, okay

17 there, good.

18          MJ:  Shall we thank you then for fixing the machinery, sir.

19 Okay.  It looks like----

20          COURT INTERPRETER:  Can you hear me?

21          MJ:  We hear you in the courtroom now.  Can Mr. Hamdan hear in

22 his headset?

23          DEFENSE INTERPRETER:  The problem is we are getting--we're

1 getting them both at the same time, we only need the Arabic.

2 MJ: Okay. You are hearing both English and Arabic in the  
3 headsets?

4 DEFENSE INTERPRETER: Yes, the English is going to drown out the  
5 Arabic. There, there, okay, good.

6 MJ: Okay. Looks like we got it fixed.

7 DEFENSE INTERPRETER: Okay.

8 MJ: Very good. We are ready to go. Please continue.

9 PROS: Thank you, sir.

10 **Questions by the prosecutor continued:**

11 Q. Major [REDACTED], you indicated that in the vehicle which is  
12 depicted in Prosecution Exhibit number 2 which I believe we have on  
13 our screen at this time that there were two SA-7 missiles; is that  
14 correct?

15 A. That's correct.

16 Q. And what happened with those missiles?

17 A. Those missiles were removed from the vehicle. We secured  
18 them, we photographed them, and then I requested instructions on what  
19 to do with them from higher and higher said, and I recommend that you  
20 go ahead and destroy them since we couldn't use them and had no use  
21 for them. They went ahead and confirmed that and we destroyed the  
22 missiles.

23



1 Q. All right. How did you destroy the missiles?

2 A. We blew them up.

3 Q. You indicated to us a moment ago that before you blew them

4 up you secured them and you photographed them; is that correct?

5 A. That is correct.

6 Q. And were you present when they were photographed?

7 A. No. I wasn't present when they were photographed.

8 Q. But did you see a photograph, in fact, when they were

9 secured----

10 A. Yes.

11 Q. ----by the armed forces.

12 A. Yes.

13 PROS: All right. At this time I would ask to be placed on the

14 screen for the judge and the witness, a photograph, Prosecution

15 Exhibit 3.

16 **[The court reporter published PE 3 to the military judge, counsel,**

17 **and the witness.]**

18 **Questions by the prosecutor continued:**

19 Q. All right, if you'll take a moment and look at what's on

20 your screen. Do you recognize that photograph?

21 A. It's not displayed yet.

22 Q. I'm sorry.

23 A. Yes, those are the SA-7's.

1 Q. All right. And that photograph fairly and accurately  
2 depicts the SA-7 missiles that you recovered from the vehicle which  
3 we have identified in Prosecution Exhibit number 2; correct?

4 A. Those are the missiles.

5 PROS: Your Honor, I tender at this time Prosecution number 3  
6 into evidence. Request permission to publish?

7 CDC [Mr. Swift]: No objection, Your Honor.

8 MJ: Very well. Without objection, Prosecution Exhibit 3 is  
9 admitted into evidence, and the words "for identification" may be  
10 stricken.

11 **[The court reporter published PE 3 to the courtroom.]**

12 **Questions by the prosecutor continued:**

13 Q. All right, drawing your attention to Prosecution Exhibit  
14 number 3. You indicated before that those are the SA-7 missiles that  
15 came out of the vehicle depicted in Prosecution Exhibit 2; correct?

16 A. That is correct.

17 Q. And I believe your previous testimony was that those  
18 particular SA-7's did not have firing mechanisms on them?

19 A. No, they did not.

20 Q. If you could identify for us on the teleprompter where  
21 those firing mechanisms would go on approximately.

22 A. **[Points at PE 3.]** At those two locations on the missiles.

23 PROS: At this time I would ask the court's permission to

1 preserve this as Prosecution Exhibit 3A.

2 MJ: Very well.

3 [The court reporter captured the exhibit as PE 3A.]

4 Questions by the prosecutor continued:

5 Q. Those in fact are the SA-7's as you testified that were  
6 also destroyed; correct.

7 A. Yes, they were.

8 Q. All right. Now previously you indicated that you saw an  
9 individual who was being led away in the general direction from the  
10 vehicle depicted in Prosecution Exhibit number 2; correct?

11 A. Yes.

12 Q. Now what ultimately happened to this individual? What did  
13 you do with him when you said you "secured him" on 24th of November  
14 2001?

15 A. The Afghan, anti-Taliban forces initially had him under  
16 their control and I ordered my guys, i.e., the American forces under  
17 my command to take positive control of him. And then we went ahead  
18 and secured him in a building away from the Afghan forces, kept him  
19 safe. We had a number of fears. The Afghans were talking about  
20 killing him. We didn't want that to happen. So we made sure he was  
21 secured under guard--one of my guards--American guard the whole time  
22 and we just secured him following procedures.

23

1 Q. Do you see the individual in the courtroom today who was the  
2 individual that you testified being taken into custody who was moving  
3 away from the general direction of the vehicle identified in  
4 Prosecution Exhibit number 2? Do you see him in the courtroom today?

5 A. Yes, I do.

6 Q. Would you please identify him for the record?

7 A. **[Points to the accused.]** It is this person at the end of  
8 this table here.

9 PROS: And, Your Honor, for the record, I would direct the  
10 court's attention that the witness has identified the accused, Mr.  
11 Hamdan.

12 MJ: Very well.

13 **Questions by the prosecutor continued:**

14 Q. And, in fact, you know him today as Mr. Salim Hamdan.  
15 You've now been able to put a name with the face of the individual  
16 that was the subject or the interaction in your testimony on the 24th  
17 of November; correct?

18 A. Yes, I am.

19 Q. Now how many days did your forces retain control of Mr.  
20 Hamdan?

21 A. We retained him for approximately 4 to 5 days.

22 Q. During this period of time how was he secured?

23 A. He was secured in a building, in an empty building. We had

1 one American guard at least with them all the time. He was hooded  
2 for most of the time and he was also restrained to ensure that he  
3 didn't escape or try anything.

4 Q. During this time if you could describe his treatment for  
5 the court?

6 A. His treatment--we tried to make sure that he was as well  
7 treated as possible. I had my medic check up on him numerous times a  
8 day. We made sure he was fed and we gave him water as best as we  
9 could. And other than making sure that he was restrained, there was  
10 no maltreatment at all. It was my intent to make sure that he was  
11 healthy and if there were any problems, we immediately addressed  
12 that.

13 Q. Did you personally check on Mr. Hamdan during this period?

14 A. There were a couple of occasions where I did check on him  
15 during this time.

16 Q. Would it be accurate to say at least once a day?

17 A. It would be--at least once a day would be accurate.

18 Q. Now at the time that Mr. Hamdan was taken into your  
19 custody, was there a photograph made of his general condition as it  
20 was at the time that he was taken by your forces?

21 A. Yes, there was a photograph taken of him.

22 PROS: Your Honor with the court's permission, I'm going to have  
23 to old school this document and pass it through the defense and then

1 pass it around to the court, in the appropriate way that we--would  
2 say we "used to do" things before the technology arrived.

3 MJ: Has the offense not already seen this document?

4 PROS: They have.

5 MJ: They have. Okay.

6 PROS: However.

7 CDC [Mr. Swift]: It's marked SECRET. We won't show it to our  
8 client, unless it is admitted, but if it is admitted pursuant to the  
9 rules, then we believe that he would be allowed to now view it  
10 because it is evidence being considered against him.

11 PROS: And in this particular occasion, Your Honor,  
12 the government has no objection. It is a photograph of Mr. Hamdan,  
13 himself.

14 MJ: Is it, in fact, secret?

15 PROS: There--it is being treated as if it were  
16 secret, yes, for purposes of viewing by the public. But it is a  
17 photograph that depicts Mr. Hamdan.

18 MJ: All right. Well you're represent then here in court that  
19 if it is shown to the accused and to his counsel, you have no  
20 objection?

21 PROS: I believe once it is admitted into evidence I think at  
22 that point then, as Mr. Swift indicated, he would have a right to  
23 view the photograph unless I am misstating what----

1 MJ: And how about the public?

2 PROS: Well, we may have no permission to show the photograph to  
3 the public.

4 MJ: Okay. Why don't you have the witness authenticate the  
5 document and we'll reserve the issue of its admission until we can  
6 sort out these----

7 PROS: Yes, sir.

8 MJ: ----these questions.

9 PROS: Very well. And Your Honor, as a bit of housekeeping I  
10 was informed during the break that the exhibit numbers, in fact, are  
11 appellate exhibits. And we are adding those appellate exhibit  
12 numbers to the end of a list of exhibits that we previously used in  
13 our first hearing when we were discussing motions jurisdiction, et  
14 cetera. So I would ask that Prosecution Exhibit number 1 be  
15 renumbered as Prosecution Exhibit [sic] 58.

16 MJ: Prosecution Exhibit 58?

17 PROS: I'm sorry Appellate Exhibit 58. Prosecution 2 be  
18 renumbered as Appellate Exhibit 59.

19 MJ: Okay. We will renumber them Appellate Exhibits 58, 59, 60,  
20 and 60A.

21 PROS: Thank you, Your Honor.

22 MJ: If you intend them to be admitted as Appellate Exhibits.

23 PROS: Thank you, Your Honor.

1 MJ: Okay.

2 PROS: And I am going to number the document under consideration  
3 at this time as Appellate Exhibit Number 61, and with your  
4 permission, approach the witness and have the witness identify the  
5 photograph.

6 MJ: Have you seen this photograph, Mr. Swift?

7 CDC [Mr. Swift]: We have seen the photograph.

8 MJ: Very good. You may show it to the witness.

9 **[The prosecutor showed AE 61 to the witness.]**

10 **Questions by the prosecutor continued:**

11 Q. All right. Major [REDACTED], you have had an opportunity to  
12 look at the Appellate Exhibit number 61 for identification [sic]?

13 A. Yes, I have.

14 Q. I'll restate the question, I'm not sure the translator  
15 heard. Have you had an opportunity to review Appellate Exhibit  
16 number 61 for identification [sic]?

17 A. Yes, I have.

18 Q. And does that photograph fairly and accurately depict Mr.  
19 Hamdan as he appeared at the time of capture?

20 A. Yes, it does.

21 PROS: All right. Now I'm going to tender this into evidence at  
22 this time as Appellate Exhibit number 61.

23 MJ: Very well. You will retain custody of that----



1 PROS: Yes, sir I have.

2 MJ: ----until we decide how it'll be treated. Very well.

3 PROS: Thank you, sir.

4 MJ: And I have reserved a ruling on its admission.

5 PROS: Yes, sir.

6 **Questions by the prosecutor continued:**

7 Q. With regard to Appellate Exhibit number 61, you testified  
8 that it fairly and accurately depicted Mr. Hamdan at the time of his  
9 capture. If you could describe how Mr. Hamdan was dressed at that  
10 time?

11 A. Mr. Hamdan was wearing the long kind of shirt that they  
12 wear in that kind of area, he also had a sweater and underneath it a  
13 bluish or purplish shirt.

14 Q. And was he wearing anything which you would consider to be  
15 a uniform, a military uniform of any kind?

16 A. No, his clothing was not any kind of uniform.

17 Q. Was--you previously testified that the Taliban forces which  
18 were opposing you had some type of black turban headdress or such?

19 A. Yes, that is correct.

20 Q. Did Mr. Hamdan have any such type headdress that you  
21 testified to previously; dark in color or anything like that?

22 A. No.

23

1           Q.    Now you indicated that Mr. Hamdan was kept in your custody  
2 for a period of approximately 4 to 5 days. How did Mr. Hamdan leave  
3 your custody?

4           A.    We finally received instructions after requesting to  
5 evacuate him to higher headquarters that he was going to be ex-filled  
6 or taken out of the country, so a helicopter came in and delivered  
7 some supplies to us and he was put aboard the helicopter and flown  
8 out.

9           Q.    The particular room that you testified to that Mr. Hamdan  
10 was held in, how many times did you see the interior of that room?

11          A.    I don't know specifically, several times I've seen the  
12 interior of the room.

13          Q.    And were you subsequently shown a video which was taken of  
14 an interrogation of Mr. Hamdan?

15          A.    Yes, recently I was.

16          Q.    In that particular video was Mr. Hamdan depicted--did you  
17 actually see him?

18          A.    Yes.

19          Q.    And is it the same Mr. Hamdan that you've identified  
20 sitting in court today?

21          A.    It is the same.

22

23

1           Q.    This particular video, were you able to recognize Mr.  
2 Hamdan as being present in the room which you've just testified to  
3 him being held in?

4           A.    Yes.

5           Q.    And were you able to draw a conclusion then as to when this  
6 video was made?

7           A.    The video was made during the time that we had Mr. Hamdan  
8 under our control.

9           Q.    Let me show you what's been marked as Appellate Exhibit  
10 number 62 for identification [sic]. And I'm going to ask you--or ask  
11 permission to approach and ask you if this is the video or one  
12 similar to it in marking that you viewed which captured the  
13 interrogation of Mr. Hamdan during that week that he was in your  
14 custody?

15          MJ:   Bailiff would get the DVD and show it to the witness,  
16 please?

17          PROS:  Thank you, sir.

18   **[The Bailiff did as directed.]**

19   **Questions by the prosecutor continued:**

20          A.    That is the DVD with the video.

21          PROS:  Thank you very much. And I would tender this, Your  
22 Honor, as Appellate Exhibit number 62.

23          CDC [Mr. Schneider]: No objection to tendering it--may I ask if

1 it is intended to be played?

2 PROS: Not at this time.

3 MJ: Okay. So there is no objection to its being admitted into  
4 evidence?

5 CDC [Mr. Schneider]: Correct.

6 MJ: Very well.

7 PROS: There'll be further identification and discussion of the  
8 video, sir.

9 MJ: Very well. Appellate Exhibit 62 is admitted into evidence.

10 **Questions by the prosecutor continued:**

11 Q. Now Major [REDACTED], when you were shown the video tape were  
12 you provided with a transcript?

13 A. Yes, I was.

14 PROS: And Your Honor, I would ask the court's permission to  
15 have the bailiff take copies of the transcript to show the witness  
16 for purposes of identification.

17 MJ: Very well.

18 **[The Bailiff did as instructed.]**

19 PROS: And the next three I believe are 63, 64, and 65; is that  
20 correct? These, Your Honor, have previously been provided to the  
21 defense.

22

23

1   **Questions by the prosecutor continued:**

2           Q.    If you could take a moment and just look at the first page  
3   of each transcript.

4   **[The witness did as directed.]**

5           Q.    I would ask you if you recall if those are, in fact, the  
6   transcripts that you were provided following along with the  
7   videotaping to you of Mr. Hamdan?

8           A.    Yes, these are the transcripts.

9           PROS:  At this, Your Honor, I would move to tender Appellate  
10   Exhibits 63, 64, and 65.

11          CDC [Mr. Schneider]:  Couple of quick questions on voir dire in  
12   aid of an objection--of a potential objection.

13          MJ:    Okay.

14          CDC [Mr. Schneider]:  Major [REDACTED], does the DVD which was  
15   admitted as Exhibit 62 contain an interrogation of anyone other than  
16   Mr. Hamdan?

17          WIT:   Yes, it does.

18          CDC [Mr. Schneider]:  And would that interrogation be of an  
19   individual named Said Boujaadia?

20          WIT:   Yes, it would.

21          CDC [Mr. Schneider]:  And among the transcripts you just looked  
22   at, is it correct that 63 and 64 are transcripts of the interrogation  
23   of Mr. Hamdan that is on the DVD admitted as Exhibit 62?

WIT: Yes, it is.

CDC [Mr. Schneider]: And Exhibit 65 is not a transcript of Mr. Hamdan's interrogation but rather Said Boujaadia's interrogation which is also on the DVD admitted as Exhibit 62?

WIT: That is correct.

CDC [Mr. Schneider]: No objection.

MJ: Very well. Appellate Exhibit 63, 64, and 65 are admitted without objection.

Questions by the prosecutor continued:

Q. With regard to Prosecution--I'm sorry with regard to Appellate Exhibit 65 I believe counsel for the defense was drawing your attention to that it is actually an interview of another individual by the name of Boujaadia; is that correct?

A. That is correct.

Q. Did you take into custody an additional person on the 24th of November 2001?

A. Yes, I did.

Q. And what actually--when was he taken into custody?

A. He was taken into custody just prior to Hamdan being taken into custody.

[END OF PAGE]

1 Q. All right. If you could describe to the court how he was  
2 taken into custody.

3 A. I recall he was taken into custody in another vehicle that  
4 was stopped and searched. That vehicle included Mr. Boujaadia and two  
5 other Arabs. There was a--they tried to resist. There was a small--  
6 short firefight and the two other Arabs were killed and Mr. Boujaadia  
7 was secured and restrained at that point.

8 Q. Now when you look at Appellate Exhibit number 62, did you,  
9 in fact, see the individual that you took into custody along with Mr.  
10 Hamdan on the 24th of November 2001?

11 A. Yes, I did see him.

12 Q. And who was that individual?

13 A. That is Mr. Boujaadia.

14 Q. So Mr. Boujaadia is depicted on the video and he is the  
15 individual that you recall was taken into custody?

16 A. Yes, he was.

17 Q. All right. What direction was Mr. Boujaadia's vehicle  
18 headed when you took Mr. Boujaadia into custody? Which vehicle was  
19 Mr. Boujaadia in?

20 A. The vehicle he was in was traveling from the southeast to  
21 the northwest on Highway 4 to Kandahar.

22 **[The prosecutor retrieved a document from the trial counsel table.]**

23 PROS: Your Honor, under the same circumstances as previously

1 indicated, I am holding Appellate Exhibit number 66 for  
2 identification [sic]. This is a picture that was--and now I am going  
3 to ask it be delivered to the witness. And this has previously been  
4 shown to the defense, sir.

5 MJ: Very good.

6 **[The Bailiff handed AE 66 to the witness.]**

7 **Questions by the prosecutor continued:**

8 Q. Major [REDACTED] I would ask you to take a moment and look at  
9 Appellate Exhibit number 66 and ask you if you can identify that  
10 photograph?

11 A. **[Examines AE 66.]** That is a photograph of Mr. Boujaadia.

12 Q. The second individual or the other individual that was  
13 taken into custody; correct?

14 A. That is correct.

15 PROS: Your Honor, I would tender this into evidence as  
16 Appellate Exhibit number 66 subject to the same concerns that we all  
17 have concerning that exhibit that we discussed already.

18 CDC [Mr. Schneider]: No objection, Your Honor.

19 MJ: Okay. We will reserve ruling on those two exhibits until  
20 we confirm that we are handling them properly.

21 PROS: Thank you, sir. If I could--just a moment.

22 **[The prosecutor conferred with co-counsel.]**

23 PROS: Your Honor, no further questions from the government at



1 this time.

2 MJ: Good, thank you.

3 Who is going to be examining this witness?

4 **CROSS-EXAMINATION**

5 **Questions by the civilian defense counsel, Mr. Schneider:**

6 Q. Good morning, Major [REDACTED].

7 A. Good morning.

8 Q. When you first learned of the SA-7 surface to air missiles  
9 confiscated that day on Highway 4 at Takteh-Pol, did it occur to you  
10 that you or your troops had intercepted weapons that otherwise could  
11 have been used against you--meaning "you," the U.S. and allied  
12 forces?

13 A. Yes.

14 Q. Did it occur to you that those weapons could have been used  
15 with respect to the battle that the intel informed you was likely to  
16 occur around Kandahar?

17 A. Yes, that had already begun actually--that battle already  
18 had begun.

19 Q. It was underway?

20 A. Yes.

21 **[END OF PAGE]**

22

23

1           Q.    Did it occur to you that the--that that was the case  
2 because the weapons were intercepted on a main highway or road that  
3 you knew to be a main supply route?

4           A.    Yes.  I believe I understand your question.  Yes, that that  
5 was the main supply route, and so that would be a prime avenue for  
6 transporting weapons.

7           Q.    Could you explain briefly what you mean by "supply route"?

8           A.    Well it is a major road and if you are going to transport  
9 fast and efficiently any number of war materiel, you'd be using the  
10 speed avenues of approach into a city or into a battle zone and that  
11 would be undoubtedly the best high speed avenue of approach into that  
12 area.

13          Q.    And did those things occur to you in part because of your  
14 knowledge there were no other similarly situated supply routes in  
15 that area between Kandahar to the north and Pakistan to the south.

16          A.    In that area that was the fastest way to go from Pakistan  
17 to Kandahar.

18          Q.    And isn't it true, sir, that based on your--the intel you  
19 received and your knowledge and your experience on the ground in that  
20 combat area that that road had been, in fact, used for those purposes  
21 in the past?

22          A.    Yes, we'd been briefed on that.

23

Q. And that it was continuing to be used at the present on November 24, 2001?

A. Yes. The latest updates I had, that road was being used to transport supplies.

Q. And one of your--one of the considerations in your mind given the considerable responsibilities that you had as a commanding officer was to try to cut off that supply; correct?

A. That is correct.

Q. And to prevent war materials as you stated from arriving at Kandahar; correct?

A. That is correct.

Q. And Kandahar was considered a strategic objective in the armed conflict then underway; correct?

A. It was--right, it was a strategic and operational objective.

Q. And one of the reasons for that was that it was a stronghold of the enemy at that time; correct?

A. Yes. Kandahar was a stronghold of the Taliban.

[END OF PAGE]

1           Q.    And while you and your forces or the forces under your  
2   command indeed the entirety of the U.S. and allied forces in the  
3   country of Afghanistan had been successful in other areas, the  
4   intelligence you had was that Kandahar remained under the enemy  
5   control at that time?

6           A.    Yes.  Kandahar was under enemy control at that time.

7           Q.    And tell me if--is it also the case that the vicinity of  
8   the airport entered into that equation?

9           A.    Yes, the airport was also a consideration.  The airport was  
10   not only under at that time Taliban control there was a large Al  
11   Qaeda training base right next to the airport.

12          Q.    And as of your time in Takteh-Pol, November 23, 24, 2001,  
13   the airport in addition to the city of Kandahar remained under enemy  
14   control; correct?

15          A.    That is correct.

16          Q.    And it was your objective, indeed part of your mission, to  
17   try to change that in the coming days?

18          A.    That is correct.

19          Q.    When you use the phrase "war materiel" or "war materials,"  
20   I believe you indicated that could include weapons, ammunition, and  
21   other supplies that would be used by the enemy?

22          A.    That is correct.

23

1           Q.    Would other supplies, based on your experience and indeed  
2 your knowledge and training even before you arrived there, include  
3 components of weapons?

4           A.    That is true.

5           Q.    The Highway 4 supply route for the transport of weapons  
6 based on your knowledge was also used for potential transport of  
7 personnel?

8           A.    Yes, Highway 4 was used for that.

9           Q.    And was it your concern that that supply route had been  
10 used for and was still being used for the purpose for the transport  
11 of personnel either of the enemy or folks that were supporting the  
12 enemy?

13          A.    Yes.

14          MJ:   I think that the interpreter has been on for 30 minutes, so  
15 in 10 or 15 more minutes we need to take a break.

16 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

17          Q.    The--am I also correct in understanding that your  
18 observations as you recited them today of the potential destination  
19 for weapons or war materials confiscated at the road block you  
20 supervised was informed by the fact that these cars you've described  
21 or vehicles were headed in the direction of Kandahar and the airport?

22          A.    They were headed in that direction.

23

1           Q.    To be clear, my question is and did that fact inform your  
2 view that these things were headed toward the battlefield as opposed  
3 to away from them?

4           A.    The fact is the direction the vehicles were traveling, what  
5 they were carrying when we confiscated the weapon systems, it was our  
6 conclusion and it was valid conclusion that those weapons were to be  
7 utilized against us or allied forces.

8           Q.    Did I hear you correctly you said that you felt personally  
9 that that was a valid conclusion?

10          A.    That was a valid conclusion at that time and that would be  
11 confirmed as the days went on and we encountered that.

12          Q.    We'll get to that, I appreciate it. And that valid  
13 conclusion you reached was based on your knowledge, experience, and  
14 your training and indeed your on-the-ground experience at that site  
15 and that time?

16          A.    Yes.

17          Q.    As well as what you had observed over the preceding days  
18 with respect to the maneuvers, positions of the enemy, and the  
19 intelligence that you had received with regard to their presence at  
20 Kandahar?

21          A.    I am not sure exactly what you are talking about as far as  
22 the road or the intelligence reports I am receiving or?

23

1 Q. What you called a valid conclusion?

2 A. Right.

3 Q. That these weapons you confiscated at Takteh-Pol were going  
4 to be used by the enemy against U.S. and coalition forces?

5 A. Right.

6 Q. I'll try my question one more time.

7 A. Okay. I see where you're----

8 Q. Was that conclusion informed by your knowledge, experience,  
9 and training and what you saw?

10 A. Yes, that would be considered militarily a sound  
11 conclusion.

12 Q. Forgive me if this sounds a little elementary on my part,  
13 but I would like you to explain briefly why it was important to  
14 minimize or totally prevent anyone from continuing to supply the  
15 enemy with war materials or weapons?

16 MJ: Counsel that question is too elementary, why don't you move  
17 to the next one. We have scarce interpreter time today and I  
18 understand the answer to that question.

19 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

20 Q. Did the forces that you were commanding engage in any  
21 combat around Kandahar?

22 A. Yes, they did.

23

1           Q.    And did you--let's turn for a moment from the road block or  
2   checkpoint.  I'd like to talk to you a little bit about the enemy  
3   troops and also the troops under your command.  One last question  
4   about the weapons.  Were they destroyed in part because you wanted to  
5   make sure that they would not be left behind and be put to any use  
6   against allied troops?

7           A.    That was one of the considerations for destroying the  
8   weapons.

9           Q.    Let's talk for a moment if we could about the troops under  
10   your command.  They consisted of U.S. personnel--and I'm interested  
11   in numbers not identities--or how many Americans under your command?

12          A.    Sixteen, including myself.

13          Q.    And I believe that you already testified to the number of  
14   the indigenous Afghan soldiers under your command as anywhere from 6  
15   to 800?

16          A.    That is correct.

17          Q.    Can you tell us briefly of why you utilize that range of  
18   several hundred?

19          A.    The Afghan forces were indigenous and so that they had--  
20   they had relations in the area and there was always issues of not  
21   only do they have to go fight, but they have to take care of the home  
22   situation or other things going on at home and so if they'd get a  
23   message that something was happening at home, they might go home for



1 a day or two and then come back. They might bring their brother with  
2 them, but then the brother might have a situation like that. It was-  
3 -it's kind of amorphous kind of situation with their troops.

4 Q. You weren't sure of who or how many would show up each day;  
5 correct?

6 A. There was a general solid core that was always there, but  
7 the exact end stay or end numbers would be fluctuating constantly.

8 Q. You used the phrase when we met the other day "ragtag"?

9 A. Yes. There was--the skill level and the training level and  
10 the competency level of this force was pretty varied. There was some  
11 who were trained under the Soviet Union; there were some who were  
12 very experienced mujahedin when they were fighting the Soviet Union.  
13 There were some who were just coming along, so I had varying skill  
14 levels and the various commanders also had varying skill levels so.

15 Q. Are you able to tell us how they appeared in their garb or  
16 what they were wearing?

17 A. They where--they were generally wearing their traditional  
18 Pashtun garb.

19 [END OF PAGE]

1           Q.    And I don't intend to have you repeat what you said  
2 earlier, but I think you told us about the garb worn by Taliban  
3 soldiers. What I am interested now is to be clear is the indigenous  
4 Afghan troops under your command, local garb would be not a military  
5 uniform?

6           A.    You couldn't say it was a consistent military uniform.

7           Q.    Were the clothes that they were wearing, the indigenous  
8 Afghan troops under your command, similar or the same as to what you  
9 would call the local residents clothing?

10          A.    A large number of them were that way, yes there was.

11          Q.    And was there any way to affirmatively distinguish that  
12 type of outfit from what the local civilians were wearing?

13          A.    That was always a problem we had. We did have some-- some  
14 uniforms dropped into them and they tried to spread it out as much as  
15 possible so that everyone had some kind of piece of identifying  
16 uniform. But it was difficult and a lot of them were wearing just  
17 traditional Afghan garb.

18          Q.    And if we may, let's turn to the enemy--what I call again  
19 the enemy--the forces opposed to the U.S. and allied forces in your  
20 command. Did you receive any briefing or intelligence about who the  
21 enemy weapons--about who the enemy was before you arrived in  
22 Afghanistan?

23          A.    Yes, I did.

1 Q. And what did you--briefly what did you learn and I am  
2 interested in just composition of the enemy forces?

3 PROS: I would let you direct and lead him so he doesn't go over  
4 into some prohibited areas.

5 CDC [Mr. Schneider]: Classified. Okay.

6 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

7 Q. Did the enemy forces to your knowledge based on the  
8 intelligence that you received before you arrived consist of Taliban  
9 soldiers?

10 A. Yes, they did.

11 Q. Any others?

12 A. There was al Qaeda.

13 Q. And when you say "al Qaeda," do you--do you mean to  
14 indicate foreign soldiers from outside of Afghanistan?

15 A. Generally, that was what they were composed of.

16 Q. Arabs?

17 A. Most often Arabs.

18 Q. Did the enemy forces based on any intelligence you received  
19 consist of any soldiers or troops other than Taliban soldiers and  
20 what you would call al Qaeda or these Arab fighters?

21 A. Did they consist of anybody else outside of Taliban and al  
22 Qaeda?

23

1 Q. Yes.

2 A. I'd have to say no at this point.

3 Q. Let me ask you one question just to see if it refreshes  
4 your recollection in any way. Did the enemy forces based on the  
5 intelligence that you received consist of any Arab fighters who were  
6 not necessarily al Qaeda?

7 A. No.

8 Q. So as far as you were concerned, any non--generally  
9 speaking--non-Taliban soldiers among the enemy were al Qaeda?

10 A. That is--that is a fair assumption.

11 Q. Based on the experience that you had and once there, did  
12 those observations remain the same?

13 A. Yes, they did.

14 Q. Did you consider the enemy forces you confronted  
15 formidable?

16 A. Yes. Compared to what I had available they were  
17 significantly more formidable than what I----

18 Q. Tenacious fighters?

19 A. Now are we talking about specific this--I mean you are  
20 getting into specifics. There was a varying degree, I guess you  
21 could say of tenacity of the fighters that we confronted during these  
22 next 2 weeks. The Taliban fighters weren't quite as tenacious and as  
23 a matter of fact after 5 or 6 days they tended--we really didn't

1 encounter them much anymore, if at all.

2           The fighters that we did encounter later on were al Qaeda  
3 fighters and this was confirmed as we were able to move and progress.  
4 They were not from Afghanistan. They were not Pashtun. They were  
5 foreign fighters and they were the ones battling us and they were the  
6 ones who refused to surrender.

7           Q.   Generally speaking Arabs?

8           A.   Yes, for the most part they were Arabs.

9           Q.   Did the enemy--and I will focus on the period from November  
10 23 or so for the next couple of weeks----

11          MJ:   Okay, can I interrupt you right now?

12          CDC [Mr. Schneider]:   Of course.

13          MJ:   I feel that we have taken the interpreter to his break  
14 point. How much longer do you envision your examination taking?

15          CDC [Mr. Schneider]:   Probably 20 minutes.

16          MJ:   Okay. Well----

17          CDC [Mr. Schneider]:   Not less than.

18          MJ:   Not less than. We need to take a break then. Given the  
19 fact that we're working at this reduced pace with one interpreter, I  
20 would like to start at 20 minutes to 12, whether or not people are  
21 back in the room. So that means for those who are returning to the  
22 gallery that the doors will close at 20 minutes to 12 and you will  
23 miss the next session if you are not in your seats by the time we

1 need to restart. To a large extent we are driven by the need to give  
2 the interpreter a break. I'd like you to consult with each other  
3 during the break about your lunch plans.

4           You have three more witnesses?

5           PROS: Yes, sir.

6           MJ: And I think that the defense's line up is still a little  
7 unsure, but we need to allow time to get through everything today or  
8 plan on returning tomorrow morning.

9           We'll take a recess until 1140. Those who want to be in  
10 the courtroom for the next session, be in your seats at 1140 and  
11 we'll let you continue your examination. Okay.

12           Court's in recess.

13 **[The R.M.C. 803 session recessed at 1122, 6 December 2007.]**

14 **[The R.M.C. 803 session was called to order at 1149, 6 December**  
15 **2007.]**

16           MJ: Court is called to order. All parties present when the  
17 court recessed are once again present.

18           During the recess we had a short meeting, and I think the  
19 defense wanted to make an announcement on the record about that  
20 meeting.

21           CDC [Mr. Schneider]: Your Honor, we communicated with Mr.  
22 Hamdan, and he is prepared to resume these proceedings now without  
23 benefit of further recess for any purpose.

1 MJ: Very well. Thank you. You may continue your examination.

2 **Cross-examination by the civilian defense counsel, Mr. Schneider,**  
3 **continued:**

4 Q. Major [REDACTED], did the enemy in and around Takteh-Pol that  
5 you engaged in late November 2001, appear to be, figuratively  
6 speaking, organized?

7 A. Not very organized, no.

8 Q. Somewhat?

9 A. Not very somewhat organized, no.

10 Q. Did they--based on anything you could observe--appear to  
11 have communications among themselves, or was it just a bunch of  
12 individuals acting independently?

13 A. Well on the Taliban side, generally it was different  
14 Taliban commanders either to the south of us or north of us seemed to  
15 be operating the--operating kind of autonomously and independently  
16 with very broad guidance.

17 The al Qaeda forces, they did have communication  
18 capabilities; yes they did, and there was some coordination between  
19 them and as to what they were doing.

20 Q. Were the Arab fighters more coordinated based on your own  
21 observations then the Taliban soldiers?

22 A. Yes, that's generally true.

1       Q.   Did they appear to have any sort of hierarchy command as  
2 far as you could tell?

3       A.   Not really. That was difficult to ascertain and the-- what  
4 we were able to experience was, you know, we were at their point end;  
5 we were encountering most of their fighting and their direct fighting  
6 coordination. But to ascertain, you know, and to be able to build an  
7 order of battle based on a hierarchy at that point; no, I wouldn't be  
8 able to fill in the blanks. It was just too much going on and other  
9 than people shooting at us, we didn't have time to do a lot of  
10 analysis on their order of battle.

11       Q.   To the extent you were able to determine or observe that  
12 the Arab fighters appeared to be in communication with one another.  
13 Do you know how? By what means?

14       A.   Yes. The Arab fighters were able to communicate with each  
15 other with small hand-held radios. And through that method they were  
16 able to coordinate their activities, at least at the tactical level.

17       Q.   Let's talk for a moment if you are able. I think we talked  
18 about the outfits of the Taliban soldiers, indeed on direct  
19 examination. The indigenous Afghan forces under your command, of  
20 course, the American troops had on uniforms you recognized?

21       A.   Yes.

22

23



1           Q.    How about the Arab fighters among the enemy who were not  
2 Taliban soldiers as far as you could tell.  What were they wearing?

3           A.    Their attire was also pretty inconsistent.  Some guys would  
4 have full camouflage uniforms--well I wouldn't even say uniforms--  
5 they were just wearing camouflage and then it ranged all the way to  
6 some of them were actually attired in Pashtun garb as well,  
7 traditional Pashtun garbs.

8           Q.    When you say, I think you said "also pretty inconsistent,"  
9 did you mean also in terms of like the Taliban-- excuse me like the  
10 indigenous Afghan soldiers on your side?

11          A.    Yes, sometimes.

12          Q.    Such that the Arab fighters among the enemy were, generally  
13 speaking, wearing garb that was not a--I'll withdraw the question.  
14 Were you able to form any opinions as to whether or not the enemy  
15 troops that you engaged in late November 2001 were well supplied?

16          A.    I couldn't--supply is a very big, very big, you know, field  
17 as far as weapons and ammunition.  They do--they always had plenty.  
18 They always seemed to have plenty to shoot at us.  As far as what  
19 they had--if we're talking batteries--eventually they ran out of  
20 vehicles because we destroyed them all, but fuel I can't say exactly  
21 what they had.  But even after we went through there, there was  
22 plenty of fuel to be found.  There was enough food to go around.

1 Q. With respect to the checkpoints, was there any profile of  
2 traveler that you were looking for?

3 A. No, we didn't have a specific profile identified at that  
4 time.

5 Q. With regard to the incident on November 24, 2001, after  
6 which Mr. Hamdan was taken into captivity, was that--what time of  
7 day?

8 A. At the earliest it was late morning, but it was likely  
9 early afternoon.

10 Q. And why--did I understand you correctly that there was  
11 present two vehicles by the time you personally arrived on the scene?

12 A. That's correct.

13 Q. Two vehicles that had been stopped and the occupants no  
14 longer in the vehicles?

15 A. That's correct.

16 Q. And how many occupants did you understand had been in the  
17 two vehicles?

18 A. I was briefed there was three occupants in the first  
19 vehicle, and an occupant in the second vehicle.

20 [END OF PAGE]

1           Q.    In your experience, did any troops on your side--under your  
2   command, ever have concern about confusing the Arab fighters--Arab  
3   fighters among the enemy with non-soldiers among the population?

4           A.    Okay.  I'm going to ask you--what do you mean by "my  
5   troops"?  Are you talking about my Pashtun troops or are you talking  
6   about my American troops?

7           Q.    The combined integrated force?

8           A.    Okay.  The force that was somewhat nominally under my  
9   command; right?  And distinguishing--I'm trying to clarify--  
10   distinguishing between just the general civilian population versus  
11   Arab fighters?

12          MJ:   Okay.  The witness is confused with your question so please  
13   re-ask it.

14   **Questions by the civilian defense counsel, Mr. Schneider, continued:**

15          Q.    I will re-ask the question, obviously.

16          A.    Okay.

17          Q.    Did any of your troops--those under your command--were they  
18   ever confused with regard to the enemy because the Arab fighters were  
19   not in uniform?

20          A.    Well at a distance it might have been difficult to tell but  
21   up close especially at the checkpoints when you're searching or going  
22   through the vehicles they were able to identify ethnically speaking

1 or racially speaking an Afghan from an Arab or someone who wasn't an  
2 Afghan.

3 Q. Do I understand that there were no Arab fighters among the  
4 coalition troops under your command?

5 A. There were no Arab fighters among mine.

6 Q. At that checkpoint, did a third vehicle come on the scene  
7 at about the same time that the two vehicles you describe were there?

8 A. I can't recall if there was.

9 Q. Are you able to describe with any precision the features of  
10 the second--excuse me, the first vehicle?

11 A. The first vehicle I recall it was----

12 MJ: Excuse me. This is the--okay.

13 CDC [Mr. Schneider]: I think I can cure what is an apparent and  
14 appropriate question by the court.

15 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

16 Q. When I refer to the first vehicle--let's do it this way.  
17 You described and identified in the photograph a Japanese-made  
18 automobile. It is the only photo you've identified of a vehicle?

19 A. Yes.

20 Q. Was that the first among those two vehicles that arrived?

21 A. That was the second vehicle.

22

23

1 Q. Okay, that was the second vehicle. Tell us then if you  
2 could, if you know of any of the identifying features of the first  
3 vehicle--and even before you do that, when you say the first vehicle,  
4 does that comport with the fact that it was ahead of the second  
5 vehicle headed north?

6 A. Yes.

7 Q. And, therefore, appropriate to conclude that it had arrived  
8 prior to the Japanese-made vehicle?

9 A. Yes.

10 Q. Okay. Then tell us, if you're able, any identifying  
11 features of the first vehicle?

12 A. The first vehicle I recall being a white van.

13 Q. Any other description?

14 A. If--I believe it also had a red crescent on it.

15 Q. I didn't hear that?

16 A. A red crescent on the side of the vehicle, on one of the  
17 driver doors or the passenger door.

18 Q. Do you know if there were any materials in that vehicle  
19 that were confiscated?

20 A. That vehicle was the first vehicle stopped. That vehicle  
21 had three personnel. They were all Arab in it. One of them was Mr.  
22 Boujaadia. Two of the passengers in that vehicle resisted or tried

1 to--well they fought back. One of them tried to detonate a grenade  
2 either as a suicide act, as well as to take out some of my troops.

3 The material confiscated from that vehicle. Yes, there was  
4 material confiscated from that vehicle. I know there was probably--I  
5 can't be specific on what it was, but with Mr. Boujaadia the material  
6 confiscated from that vehicle was associated with him and kept with  
7 him at that time.

8 There was a grenade; it didn't go off. There might--may or  
9 may not have been weapons. I can't recall if there was.

10 Q. And if there were, you don't know what they were?

11 A. Well I know there was a grenade, and the other weapons I  
12 cannot be specific about.

13 Q. What became of the Toyota--excuse me the Japanese-made  
14 vehicle which I think you said could have been a Toyota type of car?

15 A. Okay, that's vehicle number two.

16 Q. Vehicle number two?

17 A. That vehicle was a functioning vehicle and after we had  
18 confiscated or secured it, based on the capability of my force which  
19 we needed all the vehicles we could get, we decide to recycle that  
20 vehicle. In other words, that vehicle was given to my--one of my  
21 primary translators to move about the battlefield to help me  
22 coordinate.

1           Q.    It was operational and it was requisitioned for use in your  
2 continued efforts?

3           A.    Well, we continued to use it in our efforts, that's  
4 correct.

5           Q.    Did you place any insignia or identify marks on the  
6 vehicle?

7           A.    No, we did not.

8           Q.    And on the same subject, the vehicle in which the missiles  
9 were displayed in the photograph you identified earlier; was that a  
10 pickup truck?

11          A.    I'm sorry? Oh the vehicle with the picture?

12          Q.    Yes.

13          A.    The SA-7's that were in the picture on the back of a pickup  
14 truck.

15          Q.    If you could pull up that exhibit with its amended number I  
16 believe it's 61.

17   **[The court reporter published AE 061 to the courtroom.]**

18   **Questions by the civilian defense counsel, Mr. Schneider, continued?**

19          Q.    This is what I'm talking about. Was it a pickup truck?

20          A.    Yes, it was.

21                                   **[END OF PAGE]**

22

23

1           Q.    Was that a vehicle in use in your combat operations in  
2 Afghanistan in late November 2001?

3           A.    Yes, it was.  If you don't mind my going back for one  
4 second, you just triggered a memory in me.  You said we did not  
5 identify our vehicles in any way; actually that was not true, we did.  
6 We were always scared of getting hit by our own aircraft, so all our  
7 vehicles--I remember now--we put VS17 orange panel on the top of it  
8 so that we could identify them.  So that's one of the ways we were  
9 able to identify and distinguish our vehicles.  That would just  
10 prevent us from being shot by our own aircraft.

11          Q.    Did you place any sort of insignia or identifying mark on  
12 the vehicle such that it could be identified at ground level, not  
13 from the air.  For instance, so that the enemy would understand that  
14 it was not a civilian vehicle as it may have been before you  
15 repositioned it?

16          A.    To say that it could be identified from the ground is  
17 really situational dependent.

18          Q.    Any other marks besides the one on the roof?

19          A.    No.

20          Q.    How about with the truck, the same situation?

21          A.    Same thing with the trucks.

22

23



1           Q.    We talked about contents of the vehicle number one, the van  
2 or bus. The contents of vehicle number two. Do you have any  
3 personal knowledge of those contents other than what you previously  
4 described?

5           A.    Other than the scattered material that was either taken off  
6 Mr. Hamdan or taken out of the vehicle. I know it was secured. It  
7 was associated with him for disposition and we just transported it to  
8 the rear, but I didn't go through it personally.

9           Q.    You personally did not inventory it?

10          A.    No, I did not.

11          Q.    And you're unable yourself to testify today as to the  
12 specific contents of the two vehicles?

13          A.    No, I could not do that right now.

14          Q.    Let's turn for a moment to the folks you described as the  
15 three occupants of vehicle number one, the bus or van. I believe you  
16 testified to the circumstances of the two occupants other than Mr.  
17 Boujaadia. They resisted, there was some weapons involved, and there  
18 was some action taken as a result of that resistance of weapons;  
19 correct?

20          A.    Yes there was action taken. They were ultimately killed.

21          Q.    Both of them, the two individuals?

22          A.    Yes, they were.

23

1 Q. Both Arabs as far as you know?

2 A. Yes, they were.

3 Q. Was it your understanding that they--that that became a  
4 fighting at the checkpoint?

5 A. That is the way I understand it, yes.

6 Q. I think you used--and correct me if you didn't--I think you  
7 used the word suicide with respect to at least one of those  
8 individual's death that day; correct?

9 A. That's correct.

10 Q. Can you explain what you mean if not the traditional  
11 definition of suicide?

12 A. Based on our intelligence in our briefings prior to  
13 entering the country and our familiarization with al Qaeda in  
14 general, a number of their hard-core fighters when faced with capture  
15 or death would detonate a grenade against themselves, not only to  
16 kill themselves to ensure that they weren't captured, but to kill any  
17 of their possible captors.

18 Q. Then you had been made aware of that there was some  
19 apparent understanding amongst such individuals that that was some  
20 sort of martyr act?

21 A. That would be their understanding of it, yes.

Q. If you're able, based on what you observed that day, how did the behavior--apparent behavior of those two individuals who were killed differ from the behavior of Mr. Hamdan at the checkpoint?

A. I couldn't go into the details of the difference of behavior.

Q. Let me ask a different question then. Did Mr. Hamdan attempt to use any weapons to attack your troops at the checkpoint?

A. I can't say if he did or did not.

Q. To your knowledge did he?

A. Not to my knowledge.

Q. And to your knowledge--and I realize that your knowledge may be limited--but to your knowledge did he display any weapons, hold weapons, fire weapons at the checkpoint?

A. No, not to my knowledge.

Q. And to your knowledge, did he take any action which would be the same as or similar to the conduct which you previously described with respect to one of the two Arabs as in effect suicide rather than be taken prisoner?

A. No, I cannot say he did that. I don't think he was even given the opportunity to do that.

[END OF PAGE]

1           Q.    Do you have any sense based on your own experience or what  
2 you were informed that day as to how much time elapsed between the  
3 arrival of the first car--the first vehicle, van or bus, and the  
4 second vehicle, the Japanese-made hatchback?

5           A.    Right that's a--that's a good question----

6           Q.    Finally.

7           A.    I can't say exactly how long it was between the first and  
8 the second vehicle. I do know that from the event of the first  
9 vehicle where the two personnel or Egyptians were killed to the time  
10 that I arrived at the checkpoint the second vehicle had arrived. The  
11 time that it would take me to walk there if there was nothing else  
12 going on, 4 or 5 minutes; but as I've stated before, nothing--I  
13 couldn't walk 10 feet without people coming at me telling me some  
14 different or telling me something else that I needed to know or some  
15 other issue. So the walk could have been 5 minutes, it could have  
16 been 15 minutes.

17          Q.    There was, in a word, a lot going on that day?

18          A.    There was numerous things going on that day.

19          Q.    To your knowledge was Mr. Hamdan even in the presence at  
20 the road block with any weapons that were used in any way against  
21 your troops there?

22          A.    Directly, no, no.

1           Q.    Have you ever seen any reports of any type which indicate  
2   that the papers and pocket litter gathered that day came from Mr.  
3   Hamdan, Mr. Boujaadia, and from the bodies of the two dead Arabs?

4           A.    Have I even heard or seen of any reports?

5           Q.    Is that your understanding?

6           A.    Yes.  That's what I was briefed immediately, that's  
7   consistent with what would happen.

8           Q.    And have you ever seen any indication that it is difficult  
9   to precisely determine what material came from which person or even  
10   which vehicle?

11          A.    Are you saying would it be difficult to determine or if the  
12   vehicle or the pocket litter whatever were confused or mixed up?  
13   That is possible, though it is unlikely.  As soon as I ordered the  
14   American--my Americans to take control who had some understanding of  
15   collection of evidence or forensics or things associated with someone  
16   we detain, I knew it would be segregated and continuously associated  
17   with the person that it came with.

18                It's actually just part of our procedures when we detain  
19   someone.  You take their items, you take everything associated with  
20   them, you collect it and inventory it, and you continue to associate  
21   it with that person, and you do that as fast as possible.

22                It may not have been perfect initially because there was a  
23   lot of things going on at the time, but as soon as I directed that to

1 happen and the Americans took over which was as soon as I showed up  
2 on the scene, that's what, that's what happened.

3 CDC [Mr. Schneider]: I ask that the court reporter show you an  
4 exhibit and then I will ask you to identify which is among the AE 52  
5 and is the unclassified summary of evidence for the Administrative  
6 Review Board or ARB for Mr. Boujaadia.

7 PROS: Okay. Mr. Boujaadia?

8 CDC [Mr. Schneider]: Boujaadia. I apologize for my--that would  
9 be page 000217, 218, and 219.

10 PROS: I don't think that we have any objection, if I could just  
11 take a quick look at which is.

12 **[The court reporter published AE 52 to the military judge and the**  
13 **counsel.]**

14 PROS: Yeah, I think this is one I just showed yesterday.

15 **[The court reporter published AE 52 to the witness.]**

16 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

17 Q. Is it on your screen?

18 A. No I don't see it yet. There we go.

19 Q. You see a document before you which is a 6 September 2006,  
20 document entitled Unclassified Summary of Evidence during  
21 Administrative Review Board in the case of Boujaadia?

22 A. **[Examining the document.]** Yes, I see the document.

1 CDC [Mr. Schneider]: Absent objection, defense would offer the  
2 exhibit at this time.

3 MJ: Very well.

4 PROS: I have no objection.

5 MJ: Okay.

6 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

7 Q. Now that it's in evidence I'm just going to turn to the  
8 precise paragraph I would like you to take a look at on page 2 of the  
9 exhibit which has been numbered Defense Exhibit 1 presumably?  
10 Exhibit 66?

11 MJ: Now we can admit documents into evidence here as  
12 prosecution and defense exhibits for later use in the trial as  
13 articles that have already been admitted into evidence. If that's  
14 the way you want to treat these documents, let's label them  
15 prosecution and defense exhibits, and when we get to trial, if we get  
16 to trial, they will be admitted into evidence. If you want these  
17 treated as appellate exhibits they have to be readmitted later then--  
18 --

19 PROS: I would rather have them be a prosecution and defense  
20 exhibit, wouldn't you?

21 CDC [Mr. Schneider]: Do I understand--to indicate that they're  
22 automatically in evidence at the later trial?

1 MJ: If you offer them as prosecution and defense exhibits  
2 today, lay the foundation, waive objections, and they're admitted  
3 into evidence, as far as I'm concerned, they have been admitted for  
4 use at the trial.

5 CDC [Mr. Schneider]: And if they are appellate exhibits for  
6 purposes of this hearing that's not necessarily the case?

7 MJ: That's not necessarily the case, but you can meet with each  
8 other and agree that certain exhibits, you know, you have no  
9 objection they'll be treated as pre-admitted by consent of the  
10 parties.

11 CDC [Mr. Schneider]: I would propose we label this exhibit next  
12 in order AE exhibit.

13 PROS: And we can discuss this later.

14 CDC [Mr. Schneider]: Counsel and I--and we will talk.

15 MJ: Okay.

16 CDC [Mr. Schneider]: AE 66 perhaps? 67.

17 MJ: It will be the next appellate exhibit in order.

18 **[The court reporter marked the exhibit as AE 67.]**

19 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

20 Q. What has now been marked as AE 67 [REDACTED] and  
21 admitted into evidence. I'd like you to take a look at page 2 if you  
22 would and having been admitted into evidence. I would ask the court  
23 reporter project the document throughout the courtroom for me.



1 [The court reporter published AE 67 to the courtroom.]

2 Questions by the civilian defense counsel, Mr. Schneider, continued:

3 Q. Taking a look at paragraph 10. I'm going to ask you to  
4 read that--or, I will read it. "The Afghan opposition figure --  
5 figures troops took possession of two SA-7 missiles and an ICOM  
6 handheld radio from the Arabs killed in the gunfight. Troops  
7 listened to the radio's pre-tuned frequency and heard Arabs  
8 discussing the capture of their cohorts mentioning the Afghan leader  
9 by name." Were you aware at any time that the SA-7 missiles and the  
10 radio were taken from the Arabs who were killed at the scene?

11 A. No. The way I was briefed is the SA-7's were associated  
12 with the second vehicle and the handheld radio was actually  
13 associated with the Arabs killed.

14 Q. And that was based on information provided to you rather  
15 than information you obtained by your own personal observation or  
16 experience; correct, sir?

17 A. That is correct.

18 Q. Have you ever heard any reference in any government report  
19 that it is unclear which of the items belong to Hamdan or Said  
20 Boujaadia?

21 A. No. I've never heard of any evidence.

22

23

1 Q. With respect to your custody of Mr. Hamdan in the hours and  
2 days following his apprehension, you were concerned for his safety?

3 A. Yes. I was concerned.

4 Q. And based on what you knew of the Afghan troops under your  
5 command, were there valid reasons for that concern?

6 A. Yes. There are valid reasons for that concern.

7 Q. And based on what you observed and what you experienced,  
8 did you--did it occur to you that Mr. Hamdan was also similarly  
9 concerned?

10 A. I wasn't aware if he was concerned or not.

11 Q. But you would agree, would you not, that if he was  
12 concerned based on what you knew, there were valid reasons for such  
13 concern? Meaning the indigenous Afghan troops----

14 A. Right.

15 Q. ----posed a threat to his safety.

16 A. That is, that is true.

17 Q. Posed a potential valid threat to his life?

18 A. There was potential threat.

19 Q. I take it you never engaged with Mr. Hamdan in any  
20 interrogation about whose car it was that he was driving?

21 A. No. I was not involved in the interrogation.

1           Q.    Did you ever have any occasion to engage in any  
2   interrogation as to whose car it was or even which car he was  
3   driving?

4           A.    Not with him, no.  There was no interrogation by my part of  
5   Mr. Hamdan.

6           Q.    Did it ever come to your attention that there was a  
7   document seized that day--confiscated which appeared to be an  
8   authorization of some sort from the Taliban government to carry  
9   weapons?

10          A.    I had heard of that document, but I haven't seen that  
11   document.

12          Q.    Was it your understanding based on what you were told in  
13   the ordinary course in your command that that document was in the  
14   possession of Mr. Hamdan?

15          A.    Yes.

16          Q.    To your knowledge were there any limitations on the type of  
17   weapons that that would permit him to carry?

18          A.    No.

19          Q.    Just to be clear, with respect to the operational  
20   capability of the SA-7's absent integration with the launcher,  
21   battery, and aiming device, it couldn't--those couldn't be fired  
22   could they?

23          A.    Unlikely to be fired.

1           Q.    And whatever additional supplies were necessary to make  
2 them operational weren't in the vehicle where they were located?

3           A.    No.

4           Q.    It may have been in some other vehicle, but they weren't in  
5 that one?

6           A.    Not as far as I know they were not in that vehicle.

7           Q.    Or to your knowledge any other vehicle ever intercepted at  
8 the roadblock while you were there?

9           A.    While we were there in Takteh-Pol, we never--we never came  
10 into possession of the launcher units to fire SA-7's.

11          Q.    As you sit here today based on all that you learned is this  
12 experience, are you able to conclude that those SA-7's were destined  
13 for any use other than in combat in Afghanistan?

14          A.    There's no other use they'd be for.

15          Q.    Did you ever learn of any materials associated with Mr.  
16 Hamdan that were weapons other than those that you've just described  
17 as having no use other than in combat? For instance----

18          A.    According to my recollection there's no other weapons that  
19 I can associate with him.

20          Q.    And any explosives that theoretically can be used in some  
21 sort of terrorist act outside of Afghanistan anything like that  
22 recovered?

23          A.    No.

1 Q. Suicide vests?

2 A. No. Like I said there was no other weapons that I can  
3 recall that were associated with him once he was detained.

4 Q. I think you used the phrase "truck bombers" earlier that  
5 that was one of the things you would hope to intercept or interdict  
6 at the roadblock?

7 A. That is one of the concerns that we had at that time.

8 Q. And I realize there were many, but any indication of any  
9 type of any sort based on anything that that type of threat was posed  
10 by anything that was in a vehicle which you understood Mr. Hamdan had  
11 been driving?

12 A. No.

13 Q. Or anything that he had been carrying?

14 A. No.

15 Q. Or anything that was ever associated with him?

16 A. No, other than the SA-7's.

17 CDC [Mr. Schneider]: No further questions, Your Honor.

18 MJ: Very good. Okay. We've been about 40 minutes on the  
19 clock. Does the government desire more than a short redirect?

20 PROS: I would anticipate no more than 10 minutes.

21 MJ: Well. Let's--I would ask the interpreter to send us a  
22 signal somehow perhaps via the headset whether 10 more minutes is  
23 something he can accommodate.

1 COURT INTERPRETER: That's fine, Your Honor. As long as the  
2 pace is not too fast.

3 MJ: Thank you. Ten minutes it is.

4 **REDIRECT EXAMINATION**

5 **Questions by the prosecutor:**

6 Q. All right, Major [REDACTED]. Counsel for the defense has drawn  
7 your attention to Mr. Hamdan and at a particular time that he was  
8 originally stopped at the roadblock. Your testimony was from your  
9 own visual observation he was being led away from the vehicle which  
10 you've identified as an appellate exhibit?

11 A. Yes.

12 Q. Is that correct?

13 A. That is correct.

14 Q. Now at that particular time, did you see--just to clarify--  
15 did you see another vehicle that was in front of the silver in color  
16 four-door sedan?

17 A. That's correct. I recall another vehicle in front of it.

18 Q. And was it your testimony that you actually saw the SA-7's  
19 in the second vehicle?

20 A. I saw the SA-7's in the second vehicle to the best of my  
21 recollection, and that's where they were pointed to me because I  
22 remember looking down at them and the hatchback was up.

23

1 Q. So the SA-7's were not inside of the van?

2 A. No. I did not see the SA-7's in the van.

3 Q. Would it be correct to say that you saw Mr. Hamdan being  
4 led away--it was the second vehicle and the SA-7's were inside that  
5 vehicle?

6 A. That is correct.

7 Q. Now with regard to the other individual that's identified  
8 as Mr. Boujaadia. Was Mr. Boujaadia present at that time when you  
9 saw Mr. Hamdan?

10 A. No. At that time I did not see Mr. Boujaadia.

11 Q. Where if anything--if anywhere else was Mr. Boujaadia, to  
12 the best of your knowledge?

13 A. To the best of my knowledge at that point he was being held  
14 somewhere else out of my sight.

15 Q. Now we've had some discussion about--and I don't want to  
16 restate your testimony, but your testimony was there was a certain  
17 tenacity on the part of the Arab fighter which was greater or lacking  
18 than the Taliban fighters; is that correct?

19 A. That is correct.

20 Q. And on this particular day there was a firefight in which  
21 two Arab fighters were killed?

22 A. That is correct.

1           Q.   Now to the best of your knowledge, Mr. Hamdan did not fight  
2 in the same fashion, did not fight at all, to the best of your  
3 knowledge?

4           A.   To the best of my knowledge, he did not fight like that,  
5 no.

6           Q.   Now you indicated in your initial testimony that what drew  
7 your attention to this incident was the sound of gunfire?

8           A.   That is correct.

9           Q.   When you surveyed the scene--and when I say "the scene,"  
10 I'm talking about in and around the second vehicle--did you see any  
11 weapons?

12          A.   Outside of the SA-7, I cannot recall seeing any other  
13 weapons.

14          Q.   Did you see any AK-47's, for example?

15          A.   There were AK-47's around, but I can't say that they were  
16 just laying around, someone was carrying them but I didn't see any  
17 AK-47's just laying in a vehicle.

18          Q.   That would be my next question. When you looked inside the  
19 vehicle----

20          MJ:   He's answered that question.

21          PROS: All right, sir.

22

23



1 **Questions by the prosecutor continued:**

2 Q. Would it be reasonable to conclude then that there were no  
3 weapons at least from your observation that Mr. Hamdan had available  
4 to resist with?

5 A. I did not observe any kind of weapon.

6 Q. Did you----

7 MJ: Trial counsel.

8 PROS: Yes, sir.

9 MJ: I'm sorry I don't mean to interrupt your examination but I  
10 would like you to save a few minutes for the defense in case they  
11 have any need to cross.

12 PROS: Yes sir. And I'll get right to the main point of mind  
13 with my redirect.

14 **Questions by the prosecutor continued:**

15 Q. Did you participate in the battle of Kandahar?

16 A. Yes, I did.

17 Q. What happened historically--30,000 foot view?

18 A. The battle of Kandahar there was--there were two teams.  
19 One in the north and one in the south that were associated with the  
20 indigenous Pashtun anti-Taliban forces. We pushed in from the south  
21 and over the course of 2 weeks from the time we took Takteh-Pol we  
22 were engaged in constant battle with, initially Taliban and then  
23 mostly al Qaeda forces to take Kandahar airfield. And then to

1 actually enter the city of Kandahar after we negotiated to enter the  
2 city.

3 Q. In this particular battle were some or many of the Arab  
4 fighters as you've identified previously "dead enders" to the extent  
5 that they chose to fight as opposed to surrender, fight unto the  
6 death?

7 A. That would be--that would be correct in that, yeah, they  
8 were more tenacious in that they were willing--or they were going to  
9 die rather than lose or be captured and in that position, they had no  
10 choice but they had to be killed because they weren't going to  
11 surrender.

12 Q. Tactically in the course of that battle was there an  
13 encirclement of Kandahar?

14 A. By----

15 Q. By----

16 A. U.S. forces?

17 Q. ----I would call it coalition forces?

18 A. Not a very good encirclement, but there was somewhat. The  
19 Marines had come into Objective Rhino to the west of Kandahar. We  
20 had a team north of Kandahar, as well as my team to the south.

21 [END OF PAGE]

22

23

1           Q.    If--and I'm going to ask you a hypothetical question which  
2 I think is valid.  If Mr. Hamdan was able to travel through Takteh-  
3 Pol and had not been interdicted, where ultimately would he have  
4 arrived?

5           A.    He most likely would have arrived in either Kandahar or  
6 Takteh--or I'm sorry, in the Tarnak farms al Qaeda training camp  
7 outside of the Kandahar airfield.  If toward the closing phase of the  
8 battle he wasn't trapped there like a lot of them were, then those  
9 that were managed to escape they ended up in Tora Bora.

10          Q.    Now you were able to examine Mr. Hamdan physically;  
11 correct?  At the time that he was captured?

12          A.    I was able to observe him, yes.

13          Q.    Did you think of any reason why Mr. Hamdan couldn't fight?

14          A.    No.  He was perfectly fine and healthy.

15          Q.    If Mr. Hamdan were to make it to Kandahar, would there have  
16 been any reason at that time why Mr. Hamdan could not have become a  
17 fighter along with the other Arabs that you testified were fighting  
18 to the death?

19          A.    No.

20          Q.    Any reason that you could see?

21          A.    No.  No reason at all.

1 Q. Would you agree that an individual or a fighter of any type  
2 would have the option of determining when he would fight and when he  
3 would not? Would that sort of be a truism?

4 A. I'm not sure I understand.

5 Q. What I'm saying is----

6 MJ: Okay. I think I know the answer to that question. I'm  
7 looking for you to wrap up your examination so the defense will have  
8 some time as well.

9 PROS: Yes sir. One more question.

10 **Questions by the prosecutor continued:**

11 Q. Did you find any type of--you indicated and I think I might  
12 have missed this--a weapons permit on Mr. Hamdan?

13 A. Right. There was some talk that there was a weapons permit  
14 that they had carried. I never observed this weapons permit.

15 Q. And I believe counsel for the defense asked you--and this  
16 will be my final question. That particular weapons permit would not  
17 limit one to carry SA-7's, it apparently would allow him to carry  
18 other sidearms that could be used for offense and defense?

19 A. That is correct.

20 Q. Other personal weapons?

21 A. That is correct.

22 PROS: Thank you.

23 MJ: Okay. Thank you.

1 CDC [Mr. Schneider]: Your Honor, the defense has no further  
2 questions of this witness, and as far as we're concerned he may be  
3 excused.

4 MJ: Thank you. Well, we didn't use up all of our 10 minutes  
5 with the interpreter then. Okay, it's 1230. I suggest that most  
6 people would be interested in taking some lunch. Will an hour be  
7 enough time, more than enough?

8 CDC [Mr. Swift]: Normally it would, Your Honor, but we can't--  
9 going to and from the court security unless lunch has been brought in  
10 is going to be difficult. Our team's has been brought in I'm  
11 informed, so an hour is fine for us.

12 CDC [Mr. Schneider]: Take judicial notice that lunch will be  
13 delivered.

14 MJ: Okay.

15 PROS: Well, thank you. We'll be over.

16 MJ: Did you bring something for the prosecution or are they to  
17 go hungry? Okay. Well let's take an hour for lunch then.

18 Thank you, Major, for your testimony? you are excused and  
19 may withdraw from the courtroom if you wish.

20 And as far as the parties are concerned, back to PT or  
21 whatever you have scheduled for the rest of the day. Thanks for your  
22 testimony. Okay. I guess we can recess until 1230 [sic] then. Will  
23 you have your next witness standing by?

1 PROS: Yes, we will, sir.

2 MJ: Court is in recess until 1230 [sic].

3 [The R.M.C. 803 session recessed at 1230, 6 December 2007.]

4 [The R.M.C. 803 session was called to order at 1345, 6 December  
5 2007.]

6 MJ: Court is called to order. All parties present when the  
7 court recessed are once again present.

8 Trial Counsel?

9 PROS: Your Honor, we call our next witness.

10 [REDACTED], JR., FBI Special Agent, was called as a witness for  
11 the prosecution, was sworn, and testified as follows:

12 DIRECT EXAMINATION

13 Questions by the civilian trial counsel, Mr. Murphy:

14 Q. Special Agent [REDACTED], would you state your full name and  
15 spell your last name please?

16 A. [REDACTED].

17 Q. And how are you employed?

18 A. I'm employed with the Federal Bureau of Investigation.

19 Q. Could you tell us a little bit about your law enforcement  
20 background including any special training that you have received?

21 A. I've been employed with the FBI for almost 10 years now.  
22 I've received basic and some advanced training provided by the FBI  
23 and counterterrorism training.

1 Q. Did the FBI assign you to interview an individual by the  
2 name of Salim Hamdan?

3 A. They did.

4 Q. Do you recognize Mr. Hamdan in the courtroom today?

5 A. I do.

6 Q. If so, could you point to him and identify an article of  
7 clothing that he's wearing?

8 A. Mr. Hamdan is sitting there **[points in the direction of the**  
9 **accused at the defense table]**, wearing a black checkered jacket.

10 PROS: Your Honor, may the record reflect that the witness has  
11 properly identified the accused in this case.

12 MJ: It will.

13 **Questions by the civilian trial counsel, Mr. Murphy, continued:**

14 Q. During what period of time did you interview Mr. Hamdan?

15 A. It was June 26th of 2002, through July 9th of 2002.

16 Q. Where did you interview him?

17 A. Here at Guantanamo Bay.

18 Q. Approximately how many times did you interview Mr. Hamdan  
19 in June and July of 2002?

20 A. Approximately 12 to 13 times.

21 Q. Could you describe the room or the rooms where the  
22 interview took place?

23 A. The rooms were in a trailer the actual rooms were

1 approximately 12 feet by 8 feet or 10 feet. There would be 3--  
2 usually 3 chairs in the room, a small table, an air conditioning  
3 device and a one way mirror and on the other side of that would be a  
4 room for observation.

5 Q. Were other people in the room or rooms with you during  
6 these interviews?

7 A. Yes.

8 Q. And who would those people be?

9 A. Special Agents [REDACTED], of the FBI's New York office,  
10 and Special Agent [REDACTED] of the Washington Field Office.

11 Q. And he's also the FBI?

12 A. Also with the FBI.

13 Q. In what language were the interviews conducted?

14 A. Arabic.

15 Q. Were you able to understand these interviews?

16 A. Special Agent [REDACTED], Special Agent [REDACTED], would  
17 conduct the interview in Arabic, and they would provide translations  
18 in English to me.

19 Q. And was that done simultaneously?

20 A. On most occasions.

21 Q. And using that approach were you then able to understand  
22 the interview yourself?

23 A. Yes, I was.



1 Q. Was a report known as an FBI 302 prepared that summarized  
2 these interviews?

3 A. It was.

4 Q. And how was this report prepared?

5 A. An initial draft of the interview was done or prepared and  
6 then Special Agent [REDACTED], [REDACTED], and myself, reexamined that  
7 document, made changes, additions, as we felt necessary and then the  
8 document was completed and signed by the three of us.

9 Q. Who would be considered the authors of the 302 report?

10 A. Myself, Special Agent [REDACTED] and Special Agent [REDACTED].

11 Q. During these interviews that you've described, was Mr.  
12 Hamdan restrained in any way?

13 A. He was. I try to recall, I believe, in the initial stages  
14 of the interview I believe, interview session, I believe he had both  
15 leg restraints and wrist restraints. In the latter stages of the  
16 interview sessions I believe both restraints were taken off.

17 Q. What were the seating arrangements in the interview?

18 A. Typically Mr. Hamdan would sit on one side of the table,  
19 Special Agent [REDACTED], myself, Special Agent [REDACTED], would sit on  
20 the other side of the table; although there were occasions where that  
21 arrangement would change, I think on occasions we may have sat on the  
22 floor as well.

1           Q.   How close were you and the other agents to Mr. Hamdan  
2 during the interviews?

3           A.   Sometimes fairly close, but I think most of the time it  
4 probably was three feet. The distance of the table separated us.

5           Q.   How would you describe the tone of the interviews you had  
6 with Mr. Hamdan?

7           A.   The initial stages were--or the first interviews, I  
8 wouldn't say combative, but Mr. Hamdan had some concerns and those  
9 had to be addressed. And then in the latter stages of the interviews  
10 they were more conversational.

11          Q.   Did you or anyone else during interviews every yell at Mr.  
12 Hamdan or act in any manner that you would consider to be  
13 threatening?

14          A.   No, we did not.

15          Q.   Did you provide Mr. Hamdan food and water during the  
16 interviews?

17          A.   We did. On a number of occasions we brought in whatever I  
18 think we were eating at the time. Whether it be McDonalds hamburgers  
19 and I think a pizza at onetime. We brought in some fruit I believe  
20 pistachios or some nuts as well that the three of us shared.

21          Q.   Did you provide Mr. Hamdan an opportunity to pray during  
22 the course of the interviews?

23          A.   We did.

1 Q. Did there come a point where you permitted Mr. Hamdan to  
2 make a telephone call during one of these interviews?

3 A. We did.

4 Q. And could you describe that for us please?

5 A. At the first interview of Mr. Hamdan, Special Agent [REDACTED]  
6 and I in talking with Mr. Hamdan, he expressed two concerns. The  
7 first concern and probably foremost for Mr. Hamdan was the fact that  
8 his family had not heard from him and that was very concerning to  
9 him. The second concern that he had as he talked to numerous people  
10 that were asking the same questions over and over again. Special  
11 Agent [REDACTED] and I talked about the concern that he had of not being  
12 able to call or even talk to or whether anyone knew that he was dead  
13 or alive. We went to--I guess the appropriate authorities who could  
14 grant permission for a phone call and asked if that could be done; if  
15 he could place a call home.

16 Q. And did you get authorization?

17 A. Eventually we did and the next time we went to see Mr.  
18 Hamdan we had a satellite phone brought in, took Mr. Hamdan outside,  
19 I guess to get reception, and Mr. Hamdan gave the number to be dialed  
20 to Special Agent [REDACTED] who dialed the number and Special Agent  
21 [REDACTED] confirmed that the person on the other end of the phone was  
22 Mr. Hamdan's wife I believe and then the phone was passed to Mr.  
23 Hamdan who then had a 5- to 10-minute conversation I believe with his

1 wife.

2 Q. And how would you describe his demeanor both during and  
3 following that telephone opportunity that you gave to him?

4 A. He was very emotional both during and after that phone  
5 call. I believe he cried as well during that period.

6 Q. And what was his reaction to you and the other agents for  
7 giving him that opportunity?

8 A. He was thankful.

9 Q. Did the interviews continue after that?

10 A. Yes they did.

11 Q. And how would you describe the interviews immediately  
12 following that phone call?

13 A. Immediately following the phone call there was more  
14 interaction. I think at least one barrier had come down, but  
15 barriers continue to come down on over subsequent interviews as we  
16 built rapport with Mr. Hamdan.

17 Q. All right. Did you or any of the other agents provide any  
18 rights advisements to Mr. Hamdan before these interviews such as  
19 Article 31 warnings under the Uniform Code of Military Justice or  
20 Miranda-type warnings?

21 A. We did not.

22 Q. And why was that?

23 A. That was policy.

1 Q. During your interviews with Mr. Hamdan did he talk about  
2 jihad?

3 A. He did.

4 Q. What did he say about jihad?

5 A. He talked about jihad as it related to two events, if you  
6 will. First, he talked about meeting Muhammed bin Attash at a mosque  
7 in Yemen. Muhammed--and this would have been 1996-- Muhammed  
8 convinced Mr. Hamdan that they should go to Tajikistan to fight  
9 jihad. Muhammed provided Mr. Hamdan with a fraudulent passport in  
10 the name Salis Said and they traveled or attempted to travel to  
11 Tajikistan to engage in jihad. Additionally, Mr. Hamdan spoke about  
12 jihad with the Northern Alliance.

13 Q. All right. Did Mr. Hamdan talk to you about an individual  
14 by the name of Usama bin Laden?

15 A. He did.

16 Q. What, if anything, did Mr. Hamdan say about Usama bin  
17 Laden's first attempt to contact Mr. Hamdan?

18 A. This would have been about 1996 approximately. Mr. Hamdan  
19 was not successful in getting into Tajikistan for a number of reasons  
20 and came back to Afghanistan. And in Jalalabad Mr. Hamdan received  
21 word that Usama bin Laden would like to speak with him. He was there  
22 I think he traveled back to Kabul and for 3 days was not able to meet  
23 with al Qaeda Usama bin Laden and then by the time he was able to

1 meet with Usama bin Laden he had come.

2           And he heard that he'd--I think he may have traveled to  
3 Kabul--Mr. Hamdan then attempted to essentially follow bin Laden for  
4 a period of time and then finally sometime later--and this would have  
5 been after Eid, was able to meet Mr. bin Laden or Usama bin Laden in  
6 Kandahar.

7           Q.   And what timeframe are we talking about what you just  
8 described?

9           A.   This would have been I believe still in 1996 sometime after  
10 Eid.

11          Q.   Describe for us in a little greater detail and you just  
12 touched on it at the end, how the two of them, Mr. Hamdan and Usama  
13 bin Laden actually came to meet?

14          A.   In Kandahar, at the first meeting between Usama bin Laden  
15 and Mr. Hamdan, upon seeing Mr. Hamdan Usama bin Laden commented that  
16 Mr. Hamdan appeared to be from Hadramout area of Yemen. And then he  
17 offered him a job as a driver driving supplies. At the time Mr.  
18 Hamdan explained that Usama bin Laden was doing a lot of construction  
19 in the area and therefore needed supplies driven around. Mr. Hamdan  
20 did this for approximately 6 months. After that 6 month period Mr.  
21 Hamdan was offered a position in UBL's security convoy.

22          Q.   All right. And he was offered that by whom?

23          A.   Usama bin Laden.

1           Q.   All right.  And I'd like to direct your attention to the  
2 year 1998.  Did Mr. Hamdan admit to you doing several things of  
3 significance during this year?

4           A.   Yes.

5           Q.   Let's first generally list those things?

6           A.   In 1998 the two significant events would have been driving  
7 Usama bin Laden to Khost for a news conference, and then secondly  
8 evacuating the compound in Kandahar just prior to the embassy  
9 bombings in east Africa.

10          Q.   Let's start with the first event that you just described.  
11 What did Mr. Hamdan admit regarding the 1998 Usama bin Laden news  
12 conference?

13          A.   Mr. Hamdan explained that Seif Haladal approached him and  
14 told him to get ready to move out.  There were--there was going to be  
15 a movement.  At that time there were at least six cars involved in  
16 the movement to Khost.  There were--they employed a leap-frogging-  
17 type security method; that was, the rear vehicles had RPG's  
18 contained within those vehicles in case any of the lead cars were  
19 attacked so they could provide support and they went to Khost for the  
20 news conference in that formation.

21          Q.   And it was the movement of who in particular to that news  
22 conference?

23          A.   Usama bin Laden.

1 Q. And the role of Mr. Hamdan in that was to do what?

2 A. He was to be a driver in the security convoy.

3 Q. Now let's turn to the second event that you mentioned for  
4 the year 1998. What did Mr. Hamdan admit to you regarding what  
5 happened prior to the 1998 East African U.S. Embassy bombing?

6 A. Just prior to the East Africa bombings Seif Haladal again  
7 came to Mr. Hamdan asking that he get one of the cars in the security  
8 convoy fixed or tuned up. Mr. Hamdan explained that he told Seif  
9 Haladal the car was fine. Seif Haladal told him to get it fixed  
10 anyway because they were going to be moving. I think that there was  
11 an operation that was going to happen. By the way, Mr. Hamdan at  
12 that point knew something was going to happen. The convoy was to be  
13 low key. There were only going to be three vehicles in the convoy so  
14 as to not draw attention to themselves because this was the first  
15 time that Usama bin Laden was going to go toe-to-toe or face-to-face  
16 with the United States and he was unsure of what the reaction of the  
17 United States would be. And I believe they traveled to Kabul where  
18 they stayed for 10 days before returning to Kandahar.

19 Q. And again that was a transportation of Usama bin Laden by  
20 this accused, Mr. Hamdan?

21 A. That is correct.

22

23



1           Q.    You mentioned in both events in 1998, an individual had  
2   communicated with Mr. Hamdan, Seif Haladal, could you tell us who  
3   that person is?

4           A.    Seif Haladal was for all intents and purposes the head of  
5   security for Usama bin Laden.

6           Q.    I'd like to turn your attention now to the year 2000. Did  
7   Mr. Hamdan discuss with you the bombing of the U.S.S. Cole during  
8   that year?

9           A.    He did.

10          Q.    And during your interviews with him, what did he say?

11          A.    In 2000--or at least October of 2000, Mr. Hamdan was in  
12   Yemen with his wife. When the Cole was attacked Mr. Hamdan believed  
13   that he might be picked up by Yemeni security due to his close  
14   relationship with Usama bin Laden. When that didn't happen he  
15   eventually returns to Afghanistan.

16                When he's in Afghanistan he overhears a conversation  
17   between Seif Haladal, al Nashiri, and Usama bin Laden which led him  
18   to believe that Usama bin Laden was responsible for the U.S.S. Cole  
19   attack. In addition, he had a conversation with Bilal al-Makki or  
20   Abdul al-Rashim al Nashiri, who claimed to be responsible for the  
21   planning of the U.S.S. Cole attack, at which point Mr. Hamdan knew  
22   that if that was true, he would only be following the orders of Usama  
23   bin Laden.

1 Q. I'd like to now direct your attention to September 2001.  
2 What, if anything, did Mr. Hamdan tell you and the other agents about  
3 what he did days before the attack of 9/11?

4 A. Approximately 7 to 10 days before the attacks of September  
5 11th, Usama bin Laden informed those at the compound that an  
6 operation was about to take place and they were evacuating.

7 Q. And Mr. Hamdan heard that?

8 A. He did.

9 Q. Days before 9/11?

10 A. Approximately 7 to 10 days before September 11th.

11 Q. Your Honor, with the court's permission I'd like to show  
12 the commission judge what has previously been marked as Appellate  
13 Exhibit 68 for identification.

14 MJ: Very well.

15 CTC [Mr. Murphy]: If we could show that to the commission judge  
16 and I would request that it be shown to the witness and counsel.

17 MJ: Very well, please do.

18 **[The court reporter published AE 68 as directed.]**

19 **Questions by the civilian trial counsel, Mr. Murphy, continued:**

20 Q. Special Agent [REDACTED], do you now see the image before you?  
21 I note it's not on the larger screen behind the witness, if the court  
22 could permit that, I think that would be helpful as well.

23 MJ: Yes, please do.

1 [The court reporter published AE 68 to the courtroom.]

2 CTC [Mr. Murphy]: Thank you, Your Honor.

3 Questions by the civilian trial counsel, Mr. Murphy, continued:

4 Q. Do you recognize what is marked as Appellate Exhibit 68 for  
5 identification [sic]?

6 A. I do.

7 Q. And is that something you actually created with the  
8 assistance of others?

9 A. It is.

10 Q. Did Mr. Hamdan report to you the movements that Usama --  
11 that he took Usama bin Laden on and others immediately prior to and  
12 following the events of 9/11?

13 A. He did.

14 Q. Does this map that you created assist in describing that  
15 confession that you received from Mr. Hamdan?

16 A. It does.

17 Q. All right. With the court's permission I'd like you to use  
18 your finger very lightly to help trace us through the events. What  
19 did--going through chronological fashion tell us what Mr. Hamdan said  
20 happened shortly before and then following the events of 9/11.

21 A. Again, 7 to 10 days prior to the attacks on 9/11, Usama bin  
22 Laden tells those at the camp that they're to evacuate due to an  
23 operation and that's in Kandahar. This is going to be another low

1 key movement only four cars are going to be involved in this  
2 movement. Mr. Hamdan is going to drive Usama bin Laden and his son  
3 Othman. At that time as well, Othman has a bag that Mr. Hamdan  
4 believes contains money. So that convoy travels to Kabul.

5 In Kabul they stayed at Mohammed Salah's house. From there  
6 they stay in Kabul and go to a guest house where the Emir is a Saudi  
7 by the name of Anas.

8 A few days later they will travel on and this is one to  
9 three days after the 9/11 attacks, they travel to Loghar where there  
10 is a military camp that has tunnels for them. They stayed there  
11 approximately a week.

12 After that they travel on to Jalalabad and they stayed at  
13 UBL's house at the "Star of Jihad" camp where they stayed for  
14 approximately another week. Then they travel back to Kabul where  
15 they stayed for 2 to 3 days. After that they're back on the move and  
16 they head to the Khost region. They stay there for approximately 2  
17 to 3 days, give or take, to retake.

18 From there they head back to Kabul where again they stay  
19 for a short period of time, then they head back to Kandahar where  
20 they spend 1 to 2 days and then head back to Kabul. And stay for a  
21 period of time and Mr. Hamdan states that he tells Usama bin Laden  
22 that he needs to tend to his wife who is ill.

23

1 Q. During all of these travels you just described, was Mr.  
2 Hamdan admitting to you that, in fact, he and others were  
3 transporting Usama bin Laden during the entirety of that trip?

4 A. Yes, he was actually driving Usama bin Laden and his son  
5 Othman.

6 Q. Personal driver?

7 A. Personal driver.

8 Q. Did Mr. Hamdan report to you what he's heard Usama bin  
9 Laden say about the attack on America on September 11th during these  
10 travels?

11 A. He did.

12 Q. And what did he say?

13 A. While in Loghar--again this was probably from 1 to 3 days  
14 after the attacks on 9/11--Mr. Hamdan stated that he overheard Usama  
15 bin Laden commenting that he thought the attacks on 9/11 would result  
16 in 1,000 to 1,500 deaths. However, when he, Usama bin Laden, learned  
17 that it was much larger, that he was very pleased.

18 Q. And Mr. Hamdan reported that to you as statements that he,  
19 Mr. Hamdan, heard Usama bin Laden say?

20 A. That is correct.

21 CTC [Mr. Murphy]: Your Honor, I would offer as a sub-exhibit,  
22 Appellate Exhibit 68A for identification [sic].

23 MJ: Very well.

1           CTC [Mr. Murphy]: And I would formally offer both exhibits into  
2 evidence at this time, Appellate Exhibit 68 and 68A for  
3 identification [sic] and ask that the words "for identification" be  
4 stricken.

5           CDC [Mr. Schnieder]: No objection.

6           MJ: Very well. It will be admitted as appellate exhibits  
7 without objection.

8           **[The court reporter marked AEs 68 and 68A as directed.]**

9           **Questions by the civilian trial counsel, Mr. Murphy, continued:**

10          Q. Agent [REDACTED], did Mr. Hamdan talk to you about an individual  
11 by the name of Dr. Iman al Zawahiri?

12          A. He did discuss Dr. Zawahiri.

13          Q. And do you know who that is?

14          A. I do.

15          Q. Who is that?

16          A. He was the head of IJ and a member of Usama bin Laden's  
17 inner circle.

18          Q. And what did he--what did Mr. Hamdan say about Dr. Iman al  
19 Zawahiri?

20          A. Mr. Hamdan first met Dr. Zawahiri in 1998 when what we had  
21 previously discussed at the press conference that he drove Usama bin  
22 Laden to. In addition to that at a--he also had an occasion to meet  
23 with or see Dr. Zawahiri at the announcement of the merger of al

1 Qaeda and EIJ to which the new organization would be known as the  
2 base Islamic Jihad. Mr. Hamdan commented that essentially God  
3 prefers, or unity in that merger was a good thing.

4 Q. Was a good thing?

5 A. It was a good thing. In addition he, Dr. Zawahiri, was  
6 also in the movements--most of the movements that I discussed after  
7 9/11. I believe Dr. Zawahiri was already in Kabul when Mr. Hamdan  
8 and Usama bin Laden and Othman evacuated from the compound in  
9 Kandahar. Additionally, he knew that Dr. Zawahiri was a physician  
10 although he typically did not act in that capacity; however, if one  
11 of the brothers had a medical question, Dr. Zawaheri would sometimes  
12 comment upon that.

13 Q. Did Mr. Hamdan during your interviews talk about Fatwas he  
14 was aware of?

15 A. He did.

16 Q. And why don't you tell us your understanding of a Fatwa and  
17 what Mr. Hamdan admitted to you regarding these Fatwas.

18 A. My understanding of a Fatwa is essentially a religious  
19 edict that allows one to engage in that activity. Mr. Hamdan was  
20 aware of two Fatwas issued by Usama bin Laden.

21 The first Fatwa was against the Northern Alliance and he  
22 had actually seen that Fatwa in the mosque. I believe it was I guess  
23 tacked up in the mosque and he actually saw that Fatwa. The second

1 Fatwa that he was aware of was the Fatwa against the Americans  
2 although he claimed that he had not seen--actually seen that Fatwa.

3 Q. But did he indicate he was aware of it?

4 A. He was aware of it.

5 Q. And who issued that second Fatwa in '98?

6 A. Usama bin Laden.

7 Q. Did Mr. Hamdan talk to you about standard security measures  
8 he and other used when they were driving Usama bin Laden?

9 A. He did.

10 Q. With did he say in that regard?

11 A. Standard security procedures for Usama bin Laden involved  
12 nondescript vehicles, vehicles would have tinted windows. The  
13 bodyguards would have Kalishnikov rifles. No less than three  
14 vehicles depending upon length of the journey would typically dictate  
15 the number of vehicles to be involved. The drivers would be in  
16 contact with one another via radio and the movements of Usama bin  
17 Laden were always planned out.

18 MJ: Always what?

19 WIT: Planned out.

20 MJ: Thank you.

21 [END OF PAGE]

22

23



1 **Questions by the civilian trial counsel, Mr. Murphy, continued:**

2 Q. Did Mr. Hamdan admit to you attending lectures delivered by  
3 Usama bin Laden?

4 A. He did.

5 Q. And did Mr. Hamdan report to you what he heard Usama bin  
6 Laden say during these lectures?

7 A. He did.

8 Q. And what did Mr. Hamdan tell you he heard, Mr. Hamdan  
9 heard, Usama bin Laden say during these lectures?

10 A. Mr. Hamdan explained that the lectures and what Usama bin  
11 Laden would normally tell the brothers was usually always the same  
12 message. First, when the U.S. put troops on Saudi soil, they  
13 declared war; secondly, it was the duty of every Muslim to fight the  
14 Americans; and third, he talked about martyrdom or suicide missions  
15 asking the brothers to participate in those.

16 CTC [Mr. Murphy]: Your Honor, if I may just have a moment to  
17 consult with co-counsel?

18 MJ: You may.

19 **[The prosecution team conferred.]**

20 CTC [Mr. Murphy]: Your Honor, we tender the witness.

21 MJ: Very well, thank you. Well, we have been in court for  
22 about 35 minutes.

23 Do you mind breaking up your cross-examination?

1 CDC [Mr. Schnieder]: I don't mind breaking it up.

2 MJ: Okay, please go ahead and begin your cross-examination.

3 I'll stop you in about 10 minutes, if that's okay?

4 CDC [Mr. Schnieder]: Yes, Your Honor, and I will stop at your  
5 direction.

6 **CROSS-EXAMINATION**

7 **Questions by the civilian defense counsel, Mr. Schnieder:**

8 Q. Good afternoon, Agent [REDACTED]. How are you?

9 A. Good afternoon. Good, thank you.

10 Q. We've not met before; have we?

11 A. I don't believe so.

12 Q. You're aware that we did request to speak with you before  
13 today; correct?

14 A. Yes, I am.

15 Q. And that request was declined or denied?

16 A. That's correct.

17 Q. With regard to the events of your interrogation, that  
18 occurred after you had been on the job within 4 years of so?

19 A. A little over 4 years; that's correct.

20 Q. A little over 4 years. And did you have any law  
21 enforcement employment before that--before you joined the F.B.I.?

22 A. I did not.

1           Q.    Did you have any prior experience with regard to the  
2 subject matters before you were asked to come down and interrogate  
3 Mr. Hamdan?

4           A.    I did.

5           Q.    Can you describe generally what those were?

6           A.    I was on the bin Laden squad in the New York Field Office  
7 assigned to the U.S. Embassy bombing as well as I was on the  
8 investigative team for the USS COLE.

9           Q.    You obviously were not the only investigator assigned to  
10 that project--those projects; correct?

11          A.    That is correct.

12          Q.    And you were not the only investigator assigned to this  
13 project, meaning the one that brought you to Guantanamo to interview  
14 Mr. Hamdan; correct?

15          A.    That is correct.

16          Q.    Had you ever interviewed Mr. Hamdan on any other occasion  
17 other than the series of interviews that occurred over a roughly two  
18 week period from June 28, 2001--excuse me, 2002, until July 9, 2002?

19          A.    I did not interview him any other time.

20          Q.    Have you ever interviewed any other detainees at Guantanamo  
21 other than Mr. Hamdan?

22          A.    I have not.

1           Q.    Have you ever been provided any intelligence on the results  
2 of interviews of other detainees?

3           A.    I believe I have.

4           Q.    And were you provided any such information before you met  
5 Mr. Hamdan for the first time?

6           A.    On Mr. Hamdan, or on other detainees?

7           Q.    On other detainees.

8           A.    I probably was.

9           Q.    And were you provided information on Mr. Hamdan before you  
10 met him for the first time?

11          A.    I was.

12          Q.    What was the format of that information both respect to Mr.  
13 Hamdan and other detainees; was it written?

14          A.    I believe I saw both written reports as well as I believe I  
15 talked to other people about Mr. Hamdan prior to coming down here.

16          Q.    So you received information orally as well in written form;  
17 correct?

18          A.    To the best of my recollection, yes that would be correct.

19          Q.    Did you do any other preparation besides review these  
20 written materials you were provided and listen to the oral  
21 information you were provided including that of Mr. Hamdan?

22          A.    Yes, I did.

23

1 Q. What was that preparation?

2 A. I reviewed the indictment in the embassy bombings as well  
3 as reviewed my COLE investigative notes and some of the other  
4 material in the USS COLE investigation. As well as having  
5 interviewed--reviewing other interviews I had conducted.

6 Q. Was the format of those interviews you had conducted in  
7 your, I think what you called notes, were those Forms 302?

8 A. My--what I drafted would have been in the 302 format. The  
9 indictment was the indictment. And then there were other documents  
10 that were reviewed in conjunction with that which we would have what  
11 we called the electronic communication.

12 Q. Was there a file?

13 A. Yes.

14 Q. And what did the file consist of other than what you've  
15 provided that you described in your testimony today?

16 A. The embassy bombing file?

17 Q. The file--any file that you reviewed before you spoke with  
18 Mr. Hamdan for the purposes of preparing for you interview with Mr.  
19 Hamdan?

20 A. The--the COLE file contained--it was voluminous as well as  
21 the embassy file was voluminous as well. I mean it contained  
22 everything that we had gathered during both of those investigations.

1 I didn't review everything, obviously, but those files were quite  
2 substantive.

3 Q. And with regard to the information about Mr. Hamdan in  
4 particular or the events which gave rise to your assignment to  
5 interview him; what did that file consist of?

6 A. It's the same file but it's material contained within in  
7 those files and it would be interviews, the indictment, interviews  
8 that others had conducted, interviews that I had conducted, EC's,  
9 electronic communications.

10 Q. The--was there any taping equipment present when you  
11 interviewed Mr. Hamdan; video or audio?

12 A. I don't believe so.

13 Q. Were there notes taken during the interview?

14 A. Yes.

15 Q. By yourself?

16 A. Yes.

17 Q. By your fellow agents?

18 A. No, I took the notes.

19 Q. You took all the notes?

20 A. I believe that's correct.

21 [END OF PAGE]

22

23

1           Q.   And as a matter of procedure what did you do after the  
2 notes were taken; did you dictate or did you re-write or did you  
3 type?

4           A.   The notes were placed into a 1A envelope after we had  
5 finished composing the 302. And then when the 302 it's placed in the  
6 file of the 1A envelope containing those notes is placed in a 1A  
7 file.

8           Q.   And does that 1A file exist today?

9           A.   Yes.

10          Q.   Did you review anything other than your 302 Form before  
11 your testimony today?

12          A.   No, just the 302.

13          Q.   Just that one multi page document Form 302 with regard to  
14 the interview ending July 9, 2002 and transcribed on July 10, 2002?

15          A.   That's correct.

16          Q.   Did you prepare the Form 302 report at the end of the two  
17 week period or throughout the two week period?

18          A.   It was--parts were prepared during the sessions, but the  
19 final document was drafted after we had completed the interviews.

20          CDC [Mr. Schneider]: Would this be an appropriate time to  
21 recess, Your Honor?

22          MJ: Thank you. We've been on the record for 45 minutes. I  
23 think that's all we can ask our interpreter to do at a shot. And I

1 propose that we reconvene at 10 minutes until 3; okay?

2 PROS: Very well.

3 MJ: Mr. Swift, you look mystified; is there something that  
4 surprises you?

5 CDC [Mr. Swift]: No.

6 MJ: Okay. Yes, let's recess for 20 minutes and I'm would --I'm  
7 going to try hard to start at 10 minutes to 3, so I invite you all  
8 and argue you all to be back in your seats at that time.

9 Court's in recess.

10 **[The R.M.C. 803 session recessed at 1432, 6 December 2007.]**

11 **[The R.M.C. 803 session was called to order at 1456, 6 December**  
12 **2007.]**

13 MJ: The court is called to order.

14 Mr. Schneider I think was up.

15 **Cross-examination by the civilian defense counsel, Mr. Schneider,**  
16 **continued:**

17 Q. Mr. [REDACTED], Agent [REDACTED].

18 A. Yes, sir?

19 Q. The purpose of your coming to Guantanamo to conduct the  
20 interview and interrogation of Mr. Hamdan was in connection with a  
21 criminal investigation; right?

22 A. That would be correct.

23



1           Q.    And that's--I don't mean to be simple about it but that's  
2   what the FBI does among many other things, investigates criminal  
3   matters; correct?

4           A.    Among many other things.

5           Q.    Yes.  At the time that you first met him did you consider  
6   Mr. Hamdan a possible suspect?

7           A.    Yes, that would be fair to say that.

8           Q.    Lieutenant Colonel Britt asked you about--excuse me, his  
9   colleague asked you about whether you had given any sort of rights  
10  admonition to Mr. Hamdan and I think your answer was "no."  Had you  
11  interviewed him or interrogated him within the 50 States would you  
12  have given him that admonition?

13          A.    I would have.

14          Q.    That would have been standard operation procedure?

15          A.    Yes, it would.

16          Q.    And would you have told him that he had a right to an  
17  attorney if he so requested?

18          A.    I would.

19          Q.    And that he would have a right not to answer your questions  
20  if he chose to exercise that?

21          A.    I would have.

22

23

1 Q. Let's go back to the circumstances of that interview. I  
2 asked you a bit about the notes that you took and where they were. I  
3 want to ask you that if at the time you took them you attempted to  
4 take them contemporaneously as you heard the information from Mr.  
5 Hamdan, generally speaking?

6 A. As it would be translated to me by either Special Agent  
7 [REDACTED] or Special Agent [REDACTED], yes, that's correct.

8 Q. Fair enough. You weren't waiting until later that evening  
9 after you got back to your house and then trying to come up with your  
10 notes. You were taking them in the room where Mr. Hamdan as you  
11 heard the translation; correct.

12 A. That would be correct.

13 Q. And isn't it also fair to say that you were attempting to  
14 take down those notes accurately as you understood the information  
15 being translated?

16 A. That's correct.

17 Q. As accurate as you were able?

18 A. That's correct.

19 Q. Did the information recited in the Form 302 report differ  
20 in any way from the text of the notes you took?

21 A. I would say it did.

22 Q. It changed in some instances; correct?

23 A. That would be correct.

1 Q. To your knowledge has--have the notes that were taken  
2 contemporaneously during the interview been produced as far as you  
3 know and made available to us?

4 A. As far as I know I don't believe they have.

5 CDC [Mr. Schneider]: At this time we would request production  
6 of those notes in aid of the cross-examination.

7 MJ: Did you bring the notes with you?

8 WIT: I did not.

9 MJ: Okay, looks like that's an impossibility.

10 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

11 Q. Where are they?

12 A. They should be in a 1A envelope.

13 Q. I realize you--I asked you that question and you gave me  
14 that answer earlier; what I really meant to find out is geographic  
15 location if you know?

16 A. New York.

17 Q. When did you last see them?

18 A. New York.

19 Q. Did you receive any information from the Criminal  
20 Investigative Task Force before you interviewed Mr. Hamdan?

21 A. I don't know if there was a Criminal Investigative Task  
22 Force at the time.

23

1 Q. Did you did get any training in interrogation techniques  
2 before you met with him?

3 A. Interview techniques at the FBI Academy.

4 Q. Anything from the Behavioral Science Consulting Team?

5 A. No.

6 Q. Anything which you understood to be specific or particular  
7 to detainees at Guantanamo?

8 A. No.

9 Q. Did you receive any information with regard to the profiles  
10 of people apprehended and housed as detainees at Guantanamo?

11 A. I did not.

12 Q. Have you ever heard of the 055--055 Brigade?

13 A. I have only heard about it in academic type readings,  
14 headings, that sort of thing.

15 Q. Academic readings associated with the performance of your  
16 job?

17 A. Yes.

18 Q. The type of information that someone in your position would  
19 customarily take in to account with regard to your performance;  
20 correct?

21 A. That's correct.

22

23

1           Q.    Having said that, what's your understanding of the 055  
2 Brigade; what is it?

3           A.    From what I can recall, I wanted to say that it was a --  
4 purported to be a group of Afghan--not Afghan, I'm sorry, Arabs, who  
5 were fighting in Afghanistan.

6           Q.    Not Taliban?

7           A.    I don't believe it was Taliban.

8           Q.    But fighting on the Taliban side not the U.S. side;  
9 correct?

10          A.    I believe they were fighting against the--they might have  
11 been fighting against the Northern Alliance.

12          Q.    How about the Ansars; have you ever heard of them?

13          A.    No.

14          Q.    Have you ever reviewed the transcripts or translations of  
15 videotaped interviews taken of Mr. Hamdan before he was moved to  
16 Guantanamo?

17          A.    No.

18          Q.    Has anyone told you about them?

19          A.    I've heard about them.

20          Q.    I'm interested in substance; have you heard what was the  
21 information on the videotape with him on it?

22          A.    No.

23

1 Q. Where you aware that Form 302 reports existed for previous  
2 interrogations of Mr. Hamdan at the time you began your interview of  
3 Mr. Hamdan?

4 A. Yes.

5 Q. Did you read them?

6 A. I believe I did. I believe it was [REDACTED] or it  
7 could have been [REDACTED].

8 Q. And when I say Form 302 reports I'm interested in FBI  
9 reports, I don't need the names of officers necessarily.

10 A. Okay, I'm sorry. Yes.

11 Q. In fact, aren't you aware that there were some 23 reported  
12 interrogations, Form 302 reports created by law enforcement officers,  
13 8 before you interviewed him and 21--excuse me, 8 before you and the  
14 balance after you?

15 A. I did not know that there were that many after. I'm not  
16 sure that I knew about 8 prior.

17 Q. Have you read any with regard to interviews that occurred  
18 after the one you took?

19 A. No.

20 Q. Did Mr. Hamdan say anything to you during any of your  
21 conversations with him between June 28th and July 9th, 2002, to  
22 suggest that he wanted legal advice, legal counsel, anything at all?

23 A. No, I don't believe so.

1 Q. Or to any of your colleagues?

2 A. No.

3 Q. Are you aware that Mr. Hamdan indicated in his interviews  
4 that he never sought to join something called al Qaeda?

5 A. In all of those reports or with me?

6 Q. In any of them--let me backup and ask you a foundation  
7 question. Is it correct that the information that you have is a --in  
8 total, a combination of the information you heard during your  
9 interviews and information that's otherwise been provided to you;  
10 other Form 302 reports for instance?

11 A. No, my 302, or the 302 that I prepared, is only of the  
12 interviews that I conducted with Mr. Hamdan.

13 Q. But you didn't--you believe you read some that were  
14 written--transcribed before you began to conduct interviews;  
15 interviews of Mr. Hamdan?

16 A. I believe that's correct.

17 Q. And try as you might, you have that knowledge in your head  
18 somewhere or you did at one time; correct?

19 A. That's correct.

20 [END OF PAGE]

21

22

23

Q. And with that in mind, aren't you aware that Mr. Hamdan told you or other investigators who talked to him before you that he never sought to join an organization or any association known as al Qaeda?

A. I can't speak for the others. I can only speak with authority on again my interviews with Mr. Hamdan and during that time he did not express to myself that he sought to join al Qaeda.

Q. During the 12 or 13 occasions in which--over which you interrogated Mr. Hamdan in a 2 week period, is there anything in your Form 302 reports to indicate that you've ever asked him about missiles, SA-7 missiles?

A. During my interview with Mr. Hamdan I don't think we ever asked him about missiles.

Q. The occasion for his phone call to his wife that you helped facilitate sometime in the earlier part of that two week period was there ever anything said to Mr. Hamdan in your presence before that phone call about some arrangement or deal to cooperate that he wanted to discuss with his wife?

A. No.

[END OF PAGE]





Q. And isn't it also true that he told you he understood that Usama bin Laden had called Arabs to fight with or under the Taliban affiliation?

A. I don't know if it was exactly put like that. I--he stated that Usama bin Laden had called for a jihad against the Northern Alliance and that--I think the Taliban was much better than the Northern Alliance and something in that context. I don't know if they were under the Taliban but it might have been with the Taliban.

Q. With the Taliban?

A. Yes.

Q. This information that he provided to you which you've recited today; in your view is that he was cooperative in providing it over time?

A. Yes. Yes, over time.

Q. And in fact he also at your request attempted to identify individuals that he had seen or known, correct?

A. Yes he did.

Q. And as you observed during that time where he could do so he did as far as you could tell?

A. As far as I could tell he did.

[END OF PAGE]

1           Q.    Do you remember learning during the interrogation of Mr.  
2 Hamdan that he believed that al Qaeda produces two things, fighters  
3 for the front and those that are involved in outside activities.  
4 That sounds familiar doesn't it?

5           A.    That does sound familiar.

6           Q.    Rings a bell?

7           A.    Yes, it does.

8           Q.    And tell us about that.  What did he say?

9           A.    That al Qaeda produced two things; fighters for the front  
10 and those for outside activities.

11          Q.    Did you understand fighters for the front to mean those  
12 that were engaged in actual armed battle of such as with the Taliban  
13 Forces opposed to the U.S. and Coalition Forces Soldiers?

14          A.    I did not take--for the front I did not take it to mean  
15 against the U.S., I believe, but it was to--when he said the front it  
16 was the Northern--against the Northern Alliance.

17          Q.    The outside activities, did you have an understanding what  
18 that was meant to convey?

19          A.    I had an understanding that the outside activities were  
20 those activities that would take place outside of Afghanistan;  
21 terrorist type activities.

22

23

1 Q. Away from that armed conflict with the Northern Alliance  
2 perhaps things that you and I might understand as exported there to  
3 elsewhere.

4 A. Right, outside of Afghanistan. My understanding would be  
5 again, of the terrorist activities, against the United States.

6 Q. Did he convey to you that that particular aspect was  
7 something that was secret and he was not involved in that?

8 A. The outside activities were secret and he would not have  
9 intimate knowledge of those activities.

10 Q. Did he explain to you his understanding such as he had  
11 about how Arabs might be asked to join some organization known as al  
12 Qaeda; that ring a bell?

13 A. Yes.

14 Q. Didn't he tell you that at camps Arabs would be  
15 specifically asked to join?

16 A. At the camps or any Arab who wanted to join al Qaeda would  
17 have to pledge bayat to the organization in order to join.

18 Q. Isn't it also true that he told you that not everyone who  
19 went to the camps was invited; in fact it was a percentage of the  
20 overall?

21 A. Not everyone joined, but I don't think he characterized it  
22 as a percentage basis, it was just not everyone joined.

23

1           Q.    And Mr. Hamdan told you that he had no firsthand knowledge  
2 of the operations?

3           A.    That's correct he said he had no firsthand knowledge or--  
4 yes, it would be firsthand knowledge of the operations.

5           Q.    And he had no firsthand knowledge of any outside  
6 activities such as suicide bombers are folks that volunteered to be  
7 involved in that kind of activity?

8           A.    He stated that he would not have that and nor would someone  
9 question that who wasn't involved in that because if you asked too  
10 many questions that could get you in trouble.

11          Q.    And the impression you got was that he hadn't asked those  
12 questions right?

13          A.    That was my impression.

14          Q.    Isn't it also true, Agent [REDACTED], that there's nothing in  
15 your Form 302 to suggest that Mr. Hamdan's statements in that regard  
16 were untrue; correct?

17          A.    Nothing in my statement? Here was the problem I think that  
18 we had was that: It didn't make sense to us as the investigators  
19 that an individual who would be assigned to drive and be so close to  
20 Usama bin Laden would not be either part of al Qaeda or have an  
21 understanding of the inner workings of al Qaeda; however, having said  
22 that, these were statements of Mr. Hamdan as we took them during that  
23 interview.

1 Q. Just like the statements you recited earlier of Mr. Hamdan  
2 not your other understanding; correct?

3 A. That is correct.

4 Q. Let me ask the question again just to be clear, is there  
5 any--isn't it true that there is nothing in your Form 302 to suggest-  
6 ---

7 MJ: Mr. Schneider, I think you need to slow down just a little  
8 for the interpreter.

9 CDC [Mr. Schneider]: I was hoping to get through the day  
10 without doing that.

11 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

12 Q. Isn't it true that there is nothing in your Form 302 report  
13 that suggests that what Mr. Hamdan told you with respect to the fact  
14 that he had no first hand or knowledge of those operations is untrue?

15 A. Again, Mr. Hamdan stated that he had no foreknowledge.  
16 Again, the circumstances in which Mr. Hamdan described his activities  
17 with bin Laden, seems to suggest otherwise.

18 Q. I'm asking if there's anything in the Form 302.

19 A. Again, the facts and circumstances that are contained  
20 within the 302 would suggest otherwise. The statements of Mr.  
21 Hamdan, although they state otherwise, the facts and circumstances  
22 contained within the 302 would suggest otherwise.

23

1           Q.    Isn't it true that there is nothing in the Form 302 report  
2 to suggest that Mr. Hamdan was involved in the planning, had  
3 foreknowledge of the precise operations of those events?

4           A.    In the planning stages, I would--I would concur with that.

5           Q.    Then let me ask you this, isn't it true that there is  
6 nothing in the Form 302 report to suggest that he was pleased with  
7 the outcome of those activities you asked about?

8           A.    It's a difficult question I think to answer. We never  
9 asked what his emotions were related to any of those activities;  
10 however, he knew that Usama bin Laden was involved in the attacks on  
11 the embassy which killed several hundred. He knew about the attacks  
12 that Usama bin Laden was responsible for the USS COLE attack which  
13 killed many. And he knew about Usama bin Laden being responsible for  
14 9/11 and yet he continued to drive this man around. So, I didn't ask  
15 his emotion, you know, whether he was pleased for any of these  
16 activities, but he continued to drive bin Laden as well as he was he  
17 was pleased that EIJ and al Qaeda merged.

18          Q.    You say merged?

19          A.    Yes.

20          Q.    The--do you have any knowledge or information regarding the  
21 circumstances of the apprehension of Mr. Hamdan in Afghanistan?

22          A.    I have very little knowledge of it. I think most of that  
23 knowledge was obtained rather recently----

1 MJ: You know what; we've heard from a witness who was as close  
2 to that event as one could possibly be so are you just exploring  
3 here?

4 CDC [Mr. Schneider]: No.

5 MJ: Okay. I don't think he's in a better position to give me  
6 evidence about the circumstances of his apprehension than the Major.  
7 So, unless you have a place you're going, I'm going to ask you to  
8 move on to some other topic.

9 CDC [Mr. Schneider]: I understand. If he had personal  
10 knowledge I might do otherwise but he doesn't----

11 MJ: Thank you.

12 CDC [Mr. Schneider]: ----based on that last answer.

13 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

14 Q. Have you had any training or background with regard to the  
15 organization of--the structural organization of what you understand  
16 is an organization of some type?

17 Q. I guess I've had on the job training.

18 A. Do you--do you think that there's any sort of a profile of  
19 individuals who are engaged in terrorist activity based on your  
20 experience?

21 A. There are--I wouldn't say there's any one profile.

22

23



1           Q.    Did Mr. Hamdan tell you that he knew there was an outside  
2   activities committee but he didn't know what they did; he just knew  
3   there was some committee?

4           A.    Yes.  I don't recall--I don't know if he called it the  
5   outside activities committee, but he knew there was a committee in  
6   charge of outside activities.  My understanding of it was--well  
7   that's what Mr. Hamdan I believe said, or stated.

8           Q.    Are you aware that Mr. Hamdan took investigators around  
9   Kandahar and showed them sights that he could identify that were of  
10   interest to?

11          A.    I am aware of that.

12          Q.    Places that the investigators asked--excuse me, places such  
13   as residences of Usama bin Laden?

14          A.    I believe residences.  He knew where weapons may have been  
15   stored.

16          Q.    Guesthouses?

17          A.    Yes.

18          Q.    Did--were you aware that Mr. Hamdan did that on two  
19   occasions?

20          A.    I believe that--at least--at least two occasions.  I think  
21   that--that's correct.

22

23

1 Q. Did it ever come to your attention that Mr. Hamdan had a  
2 permit at the time of his apprehension to carry weapons in  
3 Afghanistan issued by the Taliban government?

4 A. I think I do recall that and not to be flippant here but I  
5 think we found that somewhat humorous that a card would be issued on  
6 that; so I believe I do recall that.

7 Q. Do you have any knowledge or do you have an opinion on  
8 whether the forces associated with the Taliban in Afghanistan  
9 included Arab fighters who were not al Qaeda; is that something you  
10 know anything about?

11 A. I'm not a real expert on the Taliban and how they were  
12 engaging with the--the fight against the Northern Alliance.

13 Q. One last question based on your knowledge, experience, and  
14 training and your experience as an FBI Agent, do you have any  
15 knowledge about the--do you have any knowledge or do you have an  
16 opinion about the circumstances of Mr. Hamdan at the time he was  
17 apprehended based on what he was doing; is that something you ever  
18 heard about?

19 A. I had only----

20 MJ: What was the question again?

21 CDC [Mr. Schneider]: Basically, do you have any opinion about  
22 the capacity of which Mr. Hamdan was traveling on Highway 4 in the  
23 direction of Kandahar from Pakistan on November 24, 2001.

1           WIT: Most of those facts you that you just stated I wasn't even  
2 aware of.

3           CDC [Mr. Schneider]: No further questions, Your Honor.

4           MJ: Okay, thank you. I'm inclined to limit cross-examination  
5 because of the time--I'm sorry, I mean direct-- redirect examination.

6           CTC [Mr. Murphy]: I think I have four questions.

7           MJ: Four questions, and then I'll give the defense four  
8 questions.

9           CDC [Mr. Schneider]: Thank you.

10          CTC [Mr. Murphy]: Your Honor----

11          MJ: Or maybe I should give the defense three questions; would  
12 that be more fair?

13                                   **REDIRECT EXAMINATION**

14   **Questions by the civilian trial counsel, Mr. Murphy:**

15          Q.   Agent [REDACTED], you were asked about who the other two FBI  
16 agents who helped you interview Mr. Hamdan and helped prepare the  
17 302. Can you tell the court what Mr. [REDACTED] and Mr. [REDACTED]--Agent  
18 [REDACTED] and Agent [REDACTED], language skills; what were the language  
19 skills that they brought to the interviews themselves and to review  
20 and preparation of the 302?

21          A.   Both Special Agent [REDACTED] and [REDACTED] are native Arabic  
22 speakers and I've worked with both of them at least-- both of them on  
23 the COLE investigation and had conducted numerous interviews with

1    them prior to the interview with Mr. Hamdan.

2           Q.    Regarding your own experience that was brought up by the  
3    defense and the fact that you have been with the FBI approximately  
4    four years at the time you became involved, what experience did you  
5    bring to this investigation based on your work of the terrorist  
6    attack against the USS COLE; briefly tell us what you did in that  
7    investigation.

8           A.    In the USS COLE investigation I was the Team Leader  
9    actually on the USS COLE site and spent a lot of time in Yemen  
10   investigating the USS COLE and was still on that investigation on  
11   September 11, 2001. I conducted countless interviews in Arabic  
12   related to the COLE. Tracked down countless leads all over the world  
13   related to the COLE investigation, so that was my role.

14          Q.    In terms of the development of the 302, could you tell us  
15   why it went through the process of being routed among the three  
16   agents involved and was revised until it reached its final form?

17          A.    With any document like that, any 302 that we do, you just  
18   want to make sure that it is as accurate as we can make it because we  
19   know we may have to go into court some day on that 302; so we just  
20   want to make sure it's as accurate as we can possibly make it.

21                               **[END OF PAGE]**

1 Q. All right, and on my forth and last question, you  
2 testified in response to the defense questioning that Mr. Hamdan  
3 didn't show any signs of approval of the attack of al Qaeda on 9/11,  
4 but I ask you did he show any remorse or regret about thousands of  
5 Americans being killed on that date.

6 A. Now, again it wasn't--we didn't ask what his emotion was;  
7 he showed no remorse.

8 CTC [Mr. Murphy]: Thank you.

9 MJ: Okay, I think four questions for the defense. Can you  
10 limit to four?

11 CDC [Mr. Schneider]: Your Honor is it okay if I don't use those  
12 four questions?

13 MJ: Well----

14 CDC [Mr. Schneider]: No further questions.

15 MJ: As long as you don't' claim unequal treatment, I guess.  
16 You waive your four questions. Okay. Thank you sir for your  
17 testimony; can we excuse the Special Agent then?

18 CDC [Mr. Schneider]: We have no further need to recall him,  
19 Your Honor, at this time.

20 MJ: Thank you for your testimony, sir.

21 **[The witness was excused and withdrew from the courtroom.]**

22 MJ: Okay. Well counsel, we've reached 3:30 in the afternoon  
23 and we've heard two witnesses. Unless the other two government

1 witnesses are going to be much briefer, we need to talk about an  
2 evening session or reassembling tomorrow morning. So, tell me what's  
3 in the future.

4 PROS: Your Honor, I believe that based on the progress of this  
5 hearing we may only have one more witness. Now, I'd like to reserve  
6 calling the fourth witness. He was going to be very brief but he may  
7 not be necessary, if that helps the court with its decision.  
8 Additionally, I would--it would be the intent of the prosecution to  
9 continue this proceeding as long as, Your Honor, the defense and the  
10 other participants can hold up.

11 MJ: Can hold up? That's a pretty low standard. Okay, so you  
12 think one more witness of approximately the same length as the first  
13 two?

14 PROS: Maybe less.

15 MJ: It has taken us about two hours to get through each of the  
16 first two witnesses.

17 PROS: Yes, sir, we understand. And it may be a bit, may be a  
18 bit longer which might cut into some of my expectation of not calling  
19 the last witness. I don't exactly know how much time we're going to  
20 gain on that; but just a little bit longer than last witness and  
21 we'll endeavor to trim our examination down to what we think is  
22 absolutely necessary.

23 MJ: It's up to you to try your case, but I'm just trying to

1 manage the clock here. What is the defense position?

2 CDC [Mr. Schneider]: The defense position is that we will stay  
3 as long as the court is willing to entertain evidence--closing  
4 argument today rather than tomorrow. We don't expect to call more  
5 than one witness. I do have some recollection that counsel for the  
6 government intended to submit a videotape which may a few more  
7 minutes than just the witnesses live. That would be in addition, but  
8 we're prepared to go tonight.

9 MJ: Okay, we'll let's take a recess now and give our  
10 interpreter a break, and then we'll let the government call its last  
11 witness. I'm inclined if the defense only has one short witness----

12 CDC [Mr. Swift]: That is inaccurate. Dr. Williams' testimony I  
13 would anticipate being with the breaks that will be necessary,  
14 between 2 and 3 hours, the same or at least of the Captain [sic] or  
15 the FBI agent. Maybe a little longer, but of course a lot has to do  
16 with cross-examination. I expect my direct to be about 90 minutes.  
17 To give the court an idea so I figured it would be half and half.

18 MJ: And that's your only witness you intend to call?

19 CDC [Mr. Swift]: No, we will be calling Said, and we may see  
20 some issues surrounded about that when it happens, but we intend to  
21 call him. I don't think he's going to be a very long witness when he  
22 gets on the stand.

23 MJ: Okay. Well, for planning purposes then I think we should

1 try to finish the governments last witness before dinner, take a  
2 dinner break, come back tonight and hear the professor's testimony as  
3 long as it's still--you know, we're still holding up. If that's the-  
4 ---

5 CDC [Mr. Swift]: My only concern----

6 MJ: And we'll plan on a session tomorrow.

7 CDC [Mr. Swift]: My concern is more for the translator in this  
8 session and if we can do Said, you know if that's possible to be done  
9 then pushing on but I think we have the ability to go tomorrow  
10 because at some point working this whole time he's going to break  
11 down. He's been marvelous reported from our parts.

12 MJ: The interpreter?

13 CDC [Mr. Swift]: He's been terrific, but he's----

14 MJ: Okay, well I'll ask----

15 CDC [Mr. Swift]: ----been pushed.

16 MJ: I'll ask the parties then to talk to the powers that be  
17 about an early start and about delaying your--either your departure  
18 or at least your trip to the airport tomorrow so we can finish taking  
19 the evidence in a timely and reasonable manner. Okay, let's take a  
20 recess for about 20 minutes and reconvene at 5 minutes until 4.  
21 We'll shoot for that.

22 Court's in recess.

23 **[The R.M.C. 803 session recessed at 1534, 6 December 2007.]**



1 [The R.M.C. 803 session was called to order at 1603, 6 December  
2 2007.]

3 MJ: Court is called to order. All parties present when we  
4 recessed are once again present.

5 PROS: Yes, sir.

6 MJ: Okay, I understand we have a witness to take out of order.

7 CDC [Mr. Swift]: Yes, Your Honor, we do.

8 MJ: Who is that?

9 CDC [Mr. Swift]: With the court's permission, the defense calls  
10 Said Boujaadia.

11 MJ: Very well. They will be bringing Mr. Boujaadia down the  
12 hall here in just a moment.

13 I gather the government has no objection----

14 PROS: No objection.

15 MJ: ----to taking this witness out of order?

16 PROS: No, sir.

17 MJ: During the last witness' testimony there was a great deal  
18 of discussion about a "302 document." Is that going to be offered  
19 into evidence?

20 CTC [Mr. Murphy]: Your Honor, it is not. Typically the  
21 witness' testimony would be the evidence and the government would not  
22 then back it up with his own report. Although we wouldn't oppose its  
23 admission, it's not the intent of the government to offer it.

1 MJ: You don't intend to offer it. And the next agent that's  
2 going to testify, will he be reporting the results of some interview?

3 CTC [Mr. Murphy]: Correct. It will be a DOD special agent,  
4 [REDACTED]. He will similarly talk about a Form 40 report which  
5 is equivalent to a 302 report regarding--and once again the  
6 government doesn't oppose its introduction, but as typical by  
7 practice I don't introduce both the agent's testimony and his report.

8 MJ: Well in the interest of economy then, allow me to suggest  
9 that if some interview of Mr. Hamdan has been reduced to writing,  
10 then I would be happy to accept that document rather than hear all of  
11 the accused's statements recited in court. If your witness can touch  
12 upon the highlights and authenticate the document or something that  
13 will take less than the full 2 hours, then the defense can do  
14 whatever cross-examination they feel is appropriate and we can press  
15 forward a little more efficiently.

16 CTC [Mr. Murphy]: Your Honor, I do think it's important----

17 MJ: Is that agreeable?

18 CTC [Mr. Murphy]: ----that you hear certain things that are not  
19 in the report.

20 MJ: Fine.

21 CTC [Mr. Murphy]: But I think I can move through it fairly  
22 efficiently. I think our last witness on direct was 35 minutes. I  
23 can endeavor to keep it moving quickly.

1 MJ: I would appreciate that. I think that's the thing to do,  
2 especially if most everything that he has to offer the court has been  
3 reduced to a report that could simply be offered into evidence.

4 CTC [Mr. Murphy]: Yes, sir.

5 APROS: Before I make that, can I review the document real  
6 quick?

7 MJ: Absolutely. Sure.

8 Is Mr. Boujaadia ready to come in the courtroom?

9 BAILIFF: Not yet, sir.

10 MJ: Not yet. Okay.

11 **[Pause.]**

12 CDC [Mr. Swift]: Your Honor?

13 MJ: Yes?

14 CDC [Mr. Swift]: Two things. One, I have a grant of  
15 testimonial immunity in relation to Mr. Boujaadia signed by the  
16 convening authority which I proffer as the next appellate exhibit.

17 MJ: Why don't you just walk it up and hand it to the court  
18 reporter, if you would.

19 PROS: No objection, Your Honor.

20 MJ: No objection from the government.

21 **[Mr. Swift handed the document to the court reporter.]**

22 MJ: So this renders moot then the motion to compel the grant of  
23 immunity that we set aside yesterday?

1 CDC [Mr. Swift]: That is correct, Your Honor.

2 MJ: Excellent.

3 CDC [Mr. Swift]: We would request at the inception of Mr.  
4 Boujaadia's testimony that you instruct him on the grant of immunity.

5 MJ: What instruction would you like me to give?

6 CDC [Mr. Swift]: That he has consulted with counsel, but he  
7 does not have counsel for the purpose of this hearing. Just remind  
8 him that the terms of his immunity as granted by the convening  
9 authority under this. It isn't in Arabic, so he won't have it to  
10 refer to. And I feel it's not appropriate for me as defense counsel  
11 to explain his immunity because it's not within my actual abilities  
12 to grant it.

13 MJ: Well has someone explained it carefully to him?

14 CDC [Mr. Swift]: My understanding is that he does understand  
15 it. If there are any questions.

16 MJ: Okay.

17 **[The witness, Mr. Boujaadia, entered the courtroom and took the**  
18 **witness stand.]**

19 MJ: May I see the grant of immunity, please? Master sergeant,  
20 would you hand me the grant of immunity, please?

21 **[The court reporter handed AE 069 to the military judge.]**

22 MJ: He's going to need a pair of headphones. He's going to  
23 need a pair of headphones so he can hear what I'm saying to him.

1   **[The bailiff handed the witness a pair of headphones.]**

2           MJ:   Is that the only one we have in the courtroom?

3   **[The witness put on the headphones.]**

4           MJ:   Mr. Boujaadia, can you hear me?

5           WIT:   There's a little bit of background noise, if you could

6   make it sound a little bit better.

7           MJ:   Okay.  I'm sitting over here on your left.  I'm the one who

8   is speaking to you.  I'm the judge in this case.

9                    You have been given a grant of immunity.

10          WIT:   I see.

11          DEFENSE INTERPRETER:  He said, "It's not clear."

12          WIT:   I cannot hear very well, if you could just make the sound

13   a little bit better.  There's interference.

14          COURT INTERPRETER:  He says, "It has become better."

15   **[The witness' headphones are repaired by the technician.]**

16          WIT:   I can hear you fine.

17          MJ:   Okay, let's see if we can make this work.

18                    Mr. Boujaadia, I want to talk to you for a moment.

19          WIT:   I can hear you now.  Every now and then I can't, but I can

20   hear you well enough.

21          MJ:   Mr. Boujaadia, the Convening Authority has given you a

22   grant of immunity to testify in this case.  The grant of immunity

23   allows you to be protected from the use of your testimony against you

1 in a later trial by Military Commission.

2 Do you understand what I'm telling you?

3 WIT: Yes.

4 MJ: You've been invited to testify in the case of Mr. Hamdan.  
5 The things you say today cannot be used against you in a later trial  
6 by Military Commission.

7 Do you understand that?

8 WIT: Yes. Yes.

9 MJ: You could be prosecuted for testifying falsely or for  
10 perjury if you were to testify falsely.

11 Do you understand that?

12 WIT: Yes.

13 MJ: Very good.

14 Trial counsel, would you please swear the witness?

15 **SAID BOUJAADIA, a civilian, was called by the defense, was sworn, and**  
16 **testified through the court interpreter as follows:**

17 **DIRECT EXAMINATION**

18 **Questions by the civilian defense counsel, Mr. Swift:**

19 Q. Mr. Boujaadia.

20 A. Yes.

21 Q. I'm going to skip all preliminaries and go directly to the  
22 day of 24 November 2001, in Afghanistan. Do you remember that day?

23 A. Yes.

1 Q. On 24 November where were you?

2 A. I don't remember exactly that date, but if you give me the  
3 Arabic date it corresponds with.

4 MJ: Why don't you ask him if he remembers the date that he was  
5 captured?

6 **Questions by the civilian defense counsel, Mr. Swift, continued:**

7 A. Well I believe that date is possibly correct.

8 Q. The day you were captured. Do you remember that day?

9 A. Don't remember the exact date of it.

10 Q. Do you remember what happened on the day that you were  
11 captured?

12 A. Yes, that I remember.

13 Q. Before you were captured where were you?

14 A. I was in the car.

15 Q. Before you were in the car where were you? I want to go  
16 back a little farther.

17 A. I was on the road.

18 Q. Were you ever at the Pakistan border before you were  
19 captured? The border between Pakistan and Afghanistan.

20 A. Yes, I was near the border. I mean just before the city  
21 which is on the border, but I don't recall how many kilometers close  
22 to the border it was.

23

1 Q. Who was with you?

2 A. I was by myself; I had my relative. I mean it is a long  
3 story. I don't know exactly how far you want me to go into it.

4 Q. When you went up to the border with Pakistan, was it  
5 originally your intent to cross the border?

6 A. Yes.

7 Q. Who did you intend to cross the border with?

8 A. I was trying to do it with my relative, my in-law.

9 Q. Your in-law was "in-laws" or just one other person?

10 A. No, just one; right.

11 Q. Who was that person?

12 A. His name was Zuhair.

13 Q. Is he your brother-in-law?

14 A. I don't want you to ask me these questions.

15 Q. It's not necessary for this. Why didn't you cross the  
16 border?

17 A. I was waiting for my in-law to come back to take me to  
18 cross, but he didn't, he left me and did not come back.

19 Q. What did you do next?

20 A. I stayed, waiting for him.

21 Q. Did he ever come back?

22 A. No, he did not come back.

23



1 Q. When he did not come back, what did you do?

2 A. When he didn't come back, I tried to move from where I was  
3 to move on.

4 Q. Where were you going?

5 A. I was going to--I was returning to Kandahar.

6 Q. Did you know that fighting was going on in Kandahar?

7 A. No, no.

8 Q. How did you plan to go to Kandahar?

9 A. I was trying by any means.

10 Q. Were you walking?

11 A. I tried to walk very close to the road.

12 Q. Which road was that?

13 A. The general road.

14 Q. If I were to say Highway 4 between Kandahar and Pakistan,  
15 would that be right?

16 A. I didn't know the name of the road it was a regular road.

17 Q. Was it between Kandahar and Pakistan?

18 A. Yes.

19 Q. Did you walk all the way back to Kandahar?

20 A. No. I was trying to find someone to move me from where I  
21 was.

22 Q. Did you find someone?

23 A. Yes.

1 Q. Tell me about them?

2 COURT INTERPRETER: Could you repeat your question, please?

3 Q. Can you tell me about the people you found to help move

4 you?

5 A. I don't know them, those people. I was hitchhiking.

6 Q. So a vehicle stopped?

7 A. Yes.

8 Q. What did the vehicle look like?

9 A. A car, a normal car.

10 Q. A car?

11 A. Like a tourist bus, a big one.

12 Q. A van then?

13 A. A family one, yes.

14 Q. What color was it?

15 A. I don't remember. It was around dusk so I don't remember

16 it was kind of hard, I would believe maybe whitish.

17 Q. Did it have a red crescent painted on it?

18 A. No, no.

19 Q. How many people were inside?

20 A. I believe two.

21 Q. Did you speak with them?

22 A. Yes.

23

1 Q. Did they speak Arabic?

2 A. Yes.

3 Q. Were they Arabs?

4 A. I believe they were Arabs.

5 Q. Could you tell where they were from?

6 A. Exactly -- exactly I think one of them maybe from his  
7 dialect was Egyptian.

8 Q. How were they dressed?

9 A. There was between me and them a barrier--a kind of a cover.  
10 I couldn't see them very well at the time. It wasn't clear.

11 Q. You said that this was at dusk; at the sunset?

12 COURT INTERPRETER: Could you please repeat the question; was  
13 this at sunset is the question?

14 Q. Had the sun set, had the sun gone down?

15 A. Yes.

16 Q. Could you see the contents of the van?

17 A. Yes.

18 Q. What was inside the van?

19 A. I was in the back. There was a box, a long box with dates  
20 in it, that's it.

21 Q. That's all that was in it?

22 A. That's it.

23

1 Q. What happened after they picked you up?

2 A. After they got me in the car, only a few minutes-- only a  
3 few minutes that's when fire was being shot at us or we were being  
4 bombarded.

5 Q. Had you pulled up to a checkpoint in Takteh-Pol?

6 A. Yes. At that point--at that checkpoint is where this  
7 happened.

8 Q. Were there any other cars in line?

9 A. No, I didn't see any.

10 Q. When the shooting started what did you do?

11 A. When the fire started, that's it, I wanted to get out of  
12 the car.

13 Q. Did you get out?

14 A. Yes, I did, I did.

15 Q. What happened to the two men in front?

16 A. I don't know anything about them; I don't know what  
17 happened.

18 Q. What happened to you?

19 A. I **[witness motions with hands]**.

20 CDC [Mr. Swift]: I believe the witness in the "I" made a motion  
21 indicating his hands that he was captured for the record.

22 MJ: Okay.

23

1    **Questions by the civilian defense counsel, Mr. Swift, continued:**

2           Q.    Who captured you?

3           A.    Afghans.

4           Q.    Did you see any Americans when you were captured?

5           A.    No.

6           Q.    Looking around this room there are many people in  
7 camouflage uniforms of the United States. Did you see anyone in a  
8 uniform that looked anything like this?

9           A.    No.

10          Q.    When they captured you, where did they take you?

11          A.    They took me to a room.

12          Q.    Was it close or far?

13          A.    Close, not too far.

14          Q.    Was it a stone room, stone house?

15          A.    I believe so. What else would it be from, iron?

16          Q.    Was anyone there?

17          A.    Yes.

18          Q.    Who was there?

19    **[The witness points to the accused.]**

20          CDC [Mr. Swift]: Let the record reflect that Mr. Boujaadia has  
21 identified Mr. Hamdan.

22          MJ:    Very well.

23          WIT:   Hi. That's Hamdan there.

1   **Questions by the civilian defense counsel, Mr. Swift, continued:**

2           Q.   How did Mr. Hamdan appear?

3           A.   He was shackled with his hands to the back and lying on the  
4 floor.   God forgive you.

5           Q.   Were you hooded when you were brought into the room?

6           A.   The first time yes, yes.

7           Q.   When did they take the hood off?

8           A.   I honestly don't remember.

9           Q.   Now you just testified that Mr. Hamdan was in the room when  
10 you were first brought in?

11          A.   When they first brought me I don't remember if they had  
12 that hood on me or not I really don't--but later on they definitely  
13 had a hood over me.

14          Q.   I want to be clear because it's important.   Did you  
15 identify--you said then when you walked in the room, right after you  
16 were captured, Mr. Hamdan was already there shackled.   Is that true?

17          A.   Yes.

18          Q.   And you saw no Americans at that time?

19          A.   No.

20          Q.   How long were you held at the house?

21          A.   A few hours.

22          Q.   Then what happened?

23          A.   They moved us to another place.

1 Q. In the same town?

2 A. Same place yes, yes.

3 Q. Were there Americans there?

4 A. No, not yet. They hadn't arrived yet.

5 Q. So you didn't see any?

6 A. No about two days later or so that's when the Americans

7 came and investigated us or interrogated us.

8 Q. How was your treatment by the Afghans?

9 A. Bad treatment.

10 Q. Why do you say that?

11 A. Because they hit us, they mistreated us, they treated us

12 like a beast.

13 Q. Did the Americans ever do that?

14 A. Don't ask me that question.

15 Q. Let me see if I can rephrase it. Did any American mistreat

16 you while you were in Takteh-Pol?

17 A. No, no.

18 WIT: This is bothering me in my ear **[pointing to the headset]**.

19 MJ: I wonder would it work if you were just to broadcast the

20 Arabic into the courtroom so we could all hear the Arabic instead of

21 using the headphones?

22 COURT INTERPRETER: Yes, no problem, Your Honor.

23 MJ: Let's try removing the headset from Mr. Boujaadia and see

1 if he could just listen.

2 WIT: I can hear very well now. Just try whatever you are  
3 touching to make it--to make less interference.

4 MJ: Please continue your questioning while the thing is  
5 working, I guess.

6 CDC [Mr. Swift]: Yes, sir.

7 **Questions by the civilian defense counsel, Mr. Swift, continued:**

8 Q. Did the Afghans ever threaten you to say that you were with  
9 al Qaeda or that you had weapons?

10 A. It's not clear what you mean.

11 Q. While you were being held, did the Afghans ever threaten  
12 you to say that you were either a member of al Qaeda or that you had  
13 been carrying weapons?

14 A. The Afghans anyone they hold or they arrest they would say  
15 that he is a member of al Qaeda, especially if they speak Arabic.

16 Q. Did the Afghans tell you that you should say you were a  
17 member of al Qaeda?

18 A. Don't ask me that question either.

19 Q. I need an answer on that one. I need to know. You are  
20 protected by immunity.

21 A. I'm sorry, excuse me.

22 Q. Can you tell me why you won't answer?

23 A. The question not sure if it's clear. I don't want to tell



1 you something that is clear, something I'm not sure of. Not answer  
2 what is not sure of.

3 Q. Fair enough. Were you ever threatened by the Afghans to  
4 say that you were a member of al Qaeda or something that was not  
5 true?

6 A. I don't recall. I am not able to answer this question for  
7 you.

8 Q. Fair enough. Just to be clear.

9 A. Yes.

10 Q. You were captured at dusk?

11 A. Yes.

12 Q. Mr. Hamdan had already been captured?

13 A. I found him in the room.

14 Q. From his appearance could you tell whether he'd been there  
15 for a while?

16 A. I don't know.

17 Q. Don't know how long he'd been there?

18 A. I do not know.

19 Q. Do you speak Afghan--do you speak Pashtun?

20 A. No.

21 Q. So when the Afghans talked, you really didn't know what  
22 they were saying?

23 A. A letter, I'm sorry--not even a letter.

1 Q. Did any of the Afghans speak Arabic?

2 A. One of them was speaking Arabic. The one who arrested me,  
3 one of them was speaking to me in Arabic--limited words.

4 Q. In your administrative board that decided that you could--  
5 that you were cleared for release, you remember--have you learned  
6 about this board?

7 A. Yes.

8 Q. It indicates that the missiles that were found on that day  
9 belonged to the dead Arabs?

10 A. I don't know these missiles that you are talking about; the  
11 first time I ever hear of them.

12 CDC [Mr. Swift]: I have no further questions for the witness.

13 MJ: Very good. Thank you.

14 Any cross-examination?

15 PROS: This will be extremely brief.

16 **CROSS-EXAMINATION**

17 **Questions by the prosecutor:**

18 Q. Good afternoon, Mr. Boujaadia.

19 A. Good evening.

20 Q. Sir, it was your testimony that you were captured in the  
21 night--during the night?

22 A. I'm sorry?

23

1           Q.    That you were captured at night or was it during the day;  
2 day or night when you were captured?

3           A.    I did answer the professor earlier but his question maybe  
4 they didn't hear my answer.

5           Q.    If he could repeat it?

6           A.    I said that I was arrested at dusk.

7           Q.    Thank you. The two individuals who were driving the van,  
8 the van that you were in, you do not know what happened to them?

9           A.    No, I heard something but----

10          Q.    What did you hear?

11          A.    That that they were killed during the investigation by the  
12 Afghans.

13          Q.    Can you tell us what investigation?

14          A.    No, I do not remember.

15          Q.    You were telling us then that the two occupants of the van-  
16 -the two others in the van, you were saying that they were not killed  
17 at or near the van?

18          A.    I don't know.

19          PROS: All right. I have no further questions, Your Honor.  
20 Thank you.

21          MJ: Very good.

22

23



1 witness then to return to his home?

2 CDC [Mr. Swift]: I have no further questions.

3 MJ: Mr. Boujaadia thank you for your testimony you may withdraw  
4 from the courtroom. Thank you.

5 **[The witness withdrew from the courtroom.]**

6 MJ: Okay well that took about 45 minutes. I think it is time  
7 for another break and then we will--let's see I am really eager to  
8 truncate the length of time you spend with this witness if whatever  
9 evidence he has, has been reduced to a statement. It is your case to  
10 try but that's what I am looking at.

11 So it is quarter to five. We could either recess for  
12 dinner and come back later for both witnesses or we could try to get  
13 your witness in before dinner. So what would you like to do?

14 PROS: Drive on, sir.

15 MJ: Drive on.

16 PROS: Yes, sir.

17 MJ: Well I also would like to, you know, to the extent you can  
18 keep your cross-examination to the most relevant portions interested  
19 in that. Okay we will take a break until 5:00 o'clock then or so and  
20 then try to come back.

21 Court's in recess.

22 **[The R.M.C. 803 session recessed at 1648, 6 December 2007.]**

23

1 [The R.M.C. 803 session was called to order at 1705, 6 December  
2 2007.]

3 MJ: The court is called to order.

4 CTC [Mr. Murphy]: Your Honor, we have our witness in place on  
5 the witness stand and with permission from the court we would like to  
6 swear him and begin the examination.

7 MJ: That would be great, but for what it's worth----

8 CTC [Mr. Murphy]: I know you want us to move expeditiously and  
9 remember to talk slowly, so I accomplish both, I believe, Your Honor.

10 MJ: Okay. For what its worth--my thinking is if we do the  
11 direct examination of this witness and if the chow hall closes at  
12 1830, is that a factor for anyone? I was thinking after the direct  
13 examination of this witness we would break for chow unless you're  
14 exceptionally quick. Please go ahead.

15 CTC [Mr. Murphy]: Yes, sir.

16 [REDACTED], FBI Special Agent, was called as a witness for the  
17 prosecution, was sworn, and testified as follows:

18 **DIRECT EXAMINATION**

19 **Questions by the civilian trial counsel, Mr. Murphy:**

20 Q. Would you state your full name and also spell your last  
21 name for the record?

22 A. My name is [REDACTED]. [REDACTED].  
23

1 Q. Agent [REDACTED], how are you employed?

2 A. I'm a Special Agent Division Chief with the Department of  
3 Defense Criminal Counterintelligence Field Activity. Previously I  
4 was a Supervisory Special Agent with the Naval Criminal Investigative  
5 Service.

6 Q. Can you tell us a little bit about your background in law  
7 enforcement and also any special language skills that you use in your  
8 law enforcement.

9 A. I've been a Federal law enforcement officer for around 17  
10 years. I completed basic and advanced Criminal Investigator training  
11 at the Federal Law Enforcement Training Center. I was assigned to a  
12 felony criminal investigative squad for approximately 5 years before  
13 I was assigned to a foreign counterintelligence billet.

14 I received Advanced Foreign Counterintelligence and  
15 Counterterrorism Investigations and Operations training and I've been  
16 involved in terrorism cases such as the first World Trade Center  
17 case. The Sheik Omar Abdul Rachman conspiracy, as well as the lead--  
18 or co-lead agent for the USS COLE investigation, as well as 9/11  
19 investigative issues.

20 As far as language training, I received language training  
21 in the Arabic language at the Defense Institute-- Defense Language  
22 Institute in a--for modern standard Arabic. Then I had follow on  
23 dialect training at Brigham Young University, and I lived and worked

1 in the near and middle east for approximately 10 years.

2 Q. How would you characterize your Arabic language skills?

3 A. Currently I have a conversational ability, but previously  
4 when I lived and worked in the Arabian Gulf I had much sharper skills  
5 and conversational ability.

6 Q. Did the Department of Defense assign you to interview Salim  
7 Hamdan?

8 A. Yes, sir.

9 Q. Do you recognize him in the courtroom today?

10 A. Yes, sir.

11 Q. If you could, would you point to him and identify an  
12 article of clothing he is wearing?

13 A. Yes, sir. **[Pointing to the accused.]** Mr. Salim Hamdan is  
14 wearing the sport jacket with a headset on himself seated to the far  
15 of my right.

16 CTC [Mr. Murphy]: Your Honor, may the record reflect that the  
17 witness has properly identified the accused in this case?

18 MJ: It may.

19 **Questions by the civilian trial counsel, Mr. Murphy, continued:**

20 Q. During what period of time did you interview Salim Hamdan?

21 A. In May of 2003.

22 Q. Where did you interview him?

23 A. It was here at Naval Station Guantanamo, Cuba.



1 Q. Approximately how many times did you interview Salim  
2 Hamdan?

3 A. I believe it was approximately three sessions over the  
4 course of 3 days, roughly 4 to 6 hours duration each session.

5 Q. Could you describe the physical setting where these  
6 interviews took place?

7 A. Yes, sir. The interview took place in the standard  
8 interview rooms in Camp Delta in a pre-constructed or prefabricated  
9 facility much like a trailer. The interview room was approximately  
10 12 feet--10 by 12 feet in size. Carpeting on the floor, climate  
11 controlled which we could control air-conditioning in the room.

12 A. Were there other people in the room when you were  
13 interviewing?

14 A. Yes, sir.

15 Q. And who were they?

16 A. That was my partner Special Agent [REDACTED], formally of  
17 the FBI.

18 Q. In what language was the interview conducted?

19 A. Arabic.

20 Q. And were you personally able to understand the interview?

21 A. Yes, sir. In instances where there was a need for  
22 translation or clarification, it was provided by Mr. [REDACTED] who was a  
23 native speaker of Arabic.

1 Q. And he's an FBI agent?

2 A. Yes, formally of the FBI; FBI agent at the time.

3 Q. During these interviews was Mr. Hamdan restrained?

4 A. No, he wasn't. Upon entering the interview room, there  
5 were I believe the customary leg restraints as well as the hand and  
6 arm restraints, but immediately upon entering the room I requested  
7 the guard force remove the restraints. For the entire duration of  
8 the interview there were no restraints.

9 Q. What were the seating arrangements in the room?

10 A. The room I believe at the time had folding chairs as well  
11 as a folding table, but in accordance with the customs I and my  
12 partner asked Mr. Hamdan if he preferred to sit on the floor which he  
13 said he did so we conducted the entire interview seated on the floor.

14 Q. How close were you and the other agents to Mr. Hamdan  
15 during the interviews?

16 A. During the interview anywhere from 1 to 2 feet and at times  
17 again in accordance with local customs, I should say customs of the  
18 Arab speaking near east, anywhere from a few inches to knee to knee.

19 Q. How would you describe the tone of the interview?

20 A. The interview--I'd describe it as conversational, cordial,  
21 non-confrontational, friendly.

22

23

1 Q. Did you or anyone else in the interview rooms ever yell at  
2 Mr. Hamdan or act in a manner that you would consider threatening?

3 A. No, sir.

4 Q. Did you provide Mr. Hamdan food, water, and opportunities  
5 to pray during the interview sessions?

6 A. Yes. We brought in to the interview light snacks, dates,  
7 and other sweets. We offered coffee, tea, and water and every time  
8 there was a prayer break or request for prayer that was done.

9 Q. Did you provide any rights advisement to Mr. Hamdan before  
10 the interviews such as Article 31 warnings under the Uniform Code of  
11 Military Justice or Miranda or Miranda type warnings?

12 A. No, sir.

13 Q. And why was that?

14 A. Well at the time according to policy established up the  
15 change of command, there was no requirement or provision for rights  
16 advisement.

17 Q. During your interviews with Mr. Hamdan did he talk to you  
18 about jihad?

19 A. Yes, yes, he did.

20 Q. And what did Mr. Hamdan say about jihad?

21 A. Salim--regarding the topic of jihad, Mr. Salim Hamdan  
22 described how in 1996 he left Yemen to go to Afghanistan to fight in  
23 the jihad front in Tajikistan. But once he arrived in Afghanistan

1 the jihad front there was a political settlement of some kind and the  
2 jihad front in Tajikistan was closed but he remained in Afghanistan.

3 Q. Did he indicate a timeframe for this jihad?

4 A. Not exactly during the year by month but in 1996 he  
5 specified.

6 Q. Did Salim Hamdan talk to you about Usama bin Laden?

7 A. Yes, sir.

8 Q. And what did Mr. Hamdan say to you about his initial  
9 encounter with Usama bin Laden?

10 A. Mr. Hamdan said that before he actually met Usama bin Laden  
11 he was familiar with his pronouncements and speeches and communiqués.  
12 Mr. Hamdan said that they were widely available when he was in Yemen.  
13 Then he said he met Usama bin Laden after the Tajikistan jihad front  
14 was closed and he remained in Afghanistan and actually met him in  
15 Kandahar.

16 Q. Did Usama bin Laden give Mr. Hamdan an assignment?

17 A. Yes, he did.

18 Q. And what was that?

19 A. Well after he had met Usama and Usama asked Salim about his  
20 background, his family, what region he was from, his talents and  
21 abilities, Salim mentioned that he had been driving vehicles since he  
22 was an adolescent or a teenager and shortly thereafter Usama bin  
23 Laden asked him to be a driver. Initially Salim said he was assigned

1 to the farms that belonged to al Qaeda, but then later asked to be a  
2 driver.

3 Q. Was Salim Hamdan paid by Usama bin Laden for this position?

4 A. According to Salim, yes.

5 Q. And how much was that?

6 A. Salim said it was somewhere around 200 to 300 dollars per  
7 month and somewhere less than 100 dollars a month for housing  
8 allowances.

9 Q. Approximately 8 months after Mr. Hamdan met Usama bin  
10 Laden, did Usama bin Laden give Mr. Hamdan a specific assignment?

11 A. Yes, sir.

12 Q. And what was that?

13 A. Well, Salim described how in that period after he  
14 initially--Sheik Usama, Sheik is how Salim would refer to him -- that  
15 he was under a period of evaluation or observation by Usama bin Laden  
16 and his head of security, Sayf al-Adl al-Musri. And after that 8  
17 month or so period of evaluation the Sheik asked him to be his  
18 personal driver.

19 Q. Did Hamdan--Mr. Hamdan admit to you how long he held this  
20 special position?

21 A. Yes, sir. It would have been sometime--according to Salim  
22 again--from that period 8 months later after the initial meeting of  
23 Usama bin Laden perhaps late '96 earlier '97 until Salim's capture in

1 November of 2001.

2 Q. And the specific assignment was personal driver for Usama  
3 bin Laden?

4 A. Personal driver, yes, sir.

5 Q. Did Mr. Hamdan talk to you about the term "bayat"?

6 A. Yes, he did.

7 Q. What does the term "bayat" mean?

8 A. Well, bayat is the unquestioning pledge of allegiance or  
9 oath to a leader.

10 Q. Did Salim Hamdan tell you he pledged bayat to anyone?

11 A. Yes.

12 Q. And who was that?

13 A. Salim said he pledged bayat to Usama bin Laden.

14 Q. Was there a certain type of bayat that Salim Hamdan pledged  
15 to Usama bin Laden?

16 A. According to Salim, yes.

17 Q. And what was that?

18 A. Salim described what he called a conditional bayat and in  
19 that regard he said to Usama bin Laden that he pledged his allegiance  
20 or oath to him and his cause as long as the cause remained the jihad  
21 against Jews and crusaders and to liberate the Arabian Peninsula.  
22 And the proviso was that he would remain under oath to Usama as long  
23 as there weren't----

1           CTC [Mr. Murphy]: That's a slow down signal.

2           WIT: Yes, I caught that.

3   **Questions by the civilian trial counsel, Mr. Murphy, continued:**

4           A. The proviso that he would remain under the pledge of the  
5 oath of the bayat to bin Laden as long as he was able to pull away  
6 from that oath if in Salim's opinion there was a cause such as  
7 fighting against other Muslim groups that Salim did not agree with.  
8 But he also added about bayat as it pertained to the bodyguards of  
9 Usama bin Laden which also Salim was detailed or assigned to asked to  
10 be a bodyguard for the Sheik, he expressed his opinion that it would  
11 very illogical if a bodyguard of Usama bin Laden had not pledged  
12 bayat.

13          Q. Are you familiar with the term "Fatwa"?

14          A. Yes, sir.

15          Q. What does that mean?

16          A. A Fatwa is a ruling--a legal ruling issued by a recognized  
17 Islamic scholar. That's the traditional and historical definition of  
18 Fatwa, but in more modern times and later times it's recognized that  
19 a Fatwa can of course be issued by a recognized Jurist scholar of  
20 Islam. But also by a leader of nominal religious cause for specific  
21 issue, and Usama bin Laden would fall into the latter category.

22

23

1 Q. Did Salim Hamdan talk to you about his knowledge of a  
2 certain Fatwa's?

3 A. Yes he did.

4 Q. And who issued those Fatwa's?

5 A. Usama bin Laden.

6 Q. In addition to being Usama bin Laden's driver, did Mr.  
7 Hamdan admit to other duties he performed for Usama bin Laden?

8 A. As I mentioned before, yes, bodyguard.

9 Q. Did Mr. Hamdan talk to you about any standard rotation of  
10 bodyguards used by Usama bin Laden?

11 A. Yes.

12 Q. What did he say about that?

13 A. Salim described how Usama bin Laden for security purposes  
14 would periodically and sometimes frequently rotate bodyguard force  
15 personnel out of the detail. And they would go variously to  
16 assignments such as Emir of guesthouses, al Qaeda guesthouses,  
17 trainers at al Qaeda training camps or to fight in the front lines  
18 presumably against the forces of Ahmad Shah Masood.

19 Q. Did Mr. Hamdan talk about any security measures that he,  
20 Mr. Hamdan, used when acting as Usama bin Ladin's driver and  
21 bodyguard?

22 A. Well, Salim had described how among other things the  
23 composition of the convoy for example, five vehicles, typically



1 pickup trucks and the use of two-way radio communications amongst  
2 members of the convoy, and that the bodyguard members of the convoy  
3 would have weapons such as Kalashnikov rifles, assault rifles, PK  
4 machine gun, rocket propelled grenades and for Salim himself he  
5 mentioned that he always had with him a Russian-made Makarov handgun.

6 Q. In the event that Usama bin Laden was attacked, did Mr.  
7 Hamdan tell you what his main role would be?

8 A. Yes, sir.

9 Q. And what was that?

10 A. That was to drive the Sheik Usama bin Laden to safety.

11 Q. Did Mr. Hamadan state to you what the role of the other  
12 drivers in the convoy would be in the event the convoy came under  
13 attack?

14 A. Yes. The other members of the bodyguard force in the  
15 convoy were to engage the attackers in the event an attack occurred.

16 Q. What, if anything, did Mr. Hamdan say to you about the need  
17 for Usama bin Laden to routinely change vehicles?

18 A. He also mentioned that that was another part of the  
19 security aspect to be overseen by the Sheik himself, Usama bin Laden  
20 as well as Sayf al-Adl, the head of security, that cars were rotated  
21 in and out of the convoy again for security measures.

22

23

1 Q. On at least the one occasion did Mr. Hamdan obtain a  
2 replacement motor vehicle from a particular source?

3 A. Yes. According to what Salim told me he did, in fact. He  
4 described how an Usama bin Laden detail convoy traveling from  
5 Kandahar to Kabul during the movement the Sheik wanted one of the  
6 cars changed and tasked Salim to pick up another car at one of the al  
7 Qaeda guesthouses in Kabul.

8 Q. That was an al Qaeda guesthouse?

9 A. Yes, sir.

10 Q. Did Mr. Hamdan talk to you about obtaining weapons and  
11 ammunition for Usama bin Laden?

12 A. Yes.

13 Q. What did he say in that regard?

14 A. Well, Salim had described how he would be tasked on  
15 occasion to pick up weapons and ammunition from a Taliban warehouse  
16 and typically he would be provided request papers issued by Sayf al-  
17 Adl. Again, he's the head of Usama bin Laden's security detail.  
18 Using one of Sheik Usama's pickup trucks from the detail he would go  
19 to the Taliban warehouse, present the paperwork to the Taliban, and  
20 then load the weapons and ammunitions into the pickup truck then  
21 transport----

22 CTC [Mr. Murphy]: I'm getting the signal just to slow down a  
23 little bit.

1           WIT:    Sure.

2   **Questions by the civilian trial counsel, Mr. Murphy, continued:**

3           Q.    You mentioned that Mr. Hamdan admitted to picking up the  
4   weapons in Usama bin Laden's pickup truck?

5           A.    Yes.

6           Q.    And what else?

7           A.    Once he would load the weapons and ammunition into the  
8   pickup truck as described by of course Salim, transport those weapons  
9   and typically to an al Qaeda--the al Qaeda base in Kandahar, and then  
10   usually it was personally overseen by Sayf al-Adl, in effect the  
11   weapons were delivered to him to the al Qaeda storage facility.

12          Q.    Did Mr. Hamdan talk to you about training that he received  
13   at the al Farouk training camp?

14          A.    Yes, sir, he did.

15          Q.    Tell us about that.

16          A.    Well, Salim had mentioned that he had a requirement to  
17   undergo al Qaeda type basic training because of his familiarity with  
18   various weapons from his years spent in Yemen.  However, he would  
19   attend as frequently as appropriate or allowable, weapons training in  
20   al Farouk training camp.  Training he said again, for example,  
21   Kalashnikov assault rifle, long guns, PK machine guns and other, not  
22   further identified, handguns.

23                He also had mentioned too that being on the Sheik's

1 bodyguard detail he would often ask Sheik Usama bin Laden--and you  
2 know what, I'm sorry when I say Sheik, I'm referring to as and  
3 others, members, the brothers, refer to the Sheik, that's Usama bin  
4 Laden--he would often ask the Sheik if he could have permission to  
5 attend training at al Farouk. Usually 1 to 2 day training sessions  
6 and Salim had mentioned that Usama bin Laden had often visited al  
7 Farouk. And at those times being a part of the detail would take  
8 advantage of being in al Farouk and then take other training in  
9 weapons.

10 Q. Several weeks before the 9/11 attack did Usama bin Laden  
11 tells something significant to Salim Hamdan?

12 A. Yes, he did.

13 Q. And what was that?

14 A. Salim said that the Sheik told him to prepare for what  
15 Salim had termed a long trip.

16 Q. What, if any, preparations were taken when Usama bin Laden  
17 talked about this long trip shortly before 9/11?

18 A. Well, the members of the convoy bodyguard detail prepared  
19 for this long trip and awaited orders.

20 Q. Did Mr. Hamdan describe his travels with a Usama bin Laden  
21 during this trip?

22 A. Yes, he did.

23

1           Q.    And what did he say?

2           A.    Well, Salim described it once the convoy of the five  
3 vehicles was assembled, Sheik Usama and one of his sons, Othman, as  
4 well as Sayf al-Adl, sat in one of the vehicles of the convoy. The  
5 convoy at the time they were in the city of Kandahar in bin Ladin's  
6 compound in Kandahar, Afghanistan. Once the Sheik gave the order for  
7 the convoy to move and as Salim described none of the members of the  
8 convoy or the bodyguard detail knew the location they would be going  
9 to, only the Sheik knew that.

10               He ordered the convoy to head out to Kandahar and as the  
11 convoy was leaving the city of Kandahar bin Laden ordered the detail,  
12 the convoy to stop and then told the convoy to head to Kabul.

13               When the convoy of the bodyguard detachment reached Kabul,  
14 Salim described in that period that the Sheik Usama was moving very,  
15 very often and among other places he stayed in was the house of an  
16 individual named Muhammad Salid as well moving to the guesthouses in  
17 those locations of other al Qaeda leaders. Salim said that also  
18 during that period the Sheik would order the convoy to move out and  
19 then stop in what Salim described as the middle of nowhere at which  
20 time Usama bin Laden would order the detail to camp there overnight.  
21 Actually on the day of 9/11, Salim said that when the Sheik was in  
22 Kabul, Salim was at another location at an al Qaeda location, but as  
23 soon as he heard of the attack he immediately headed back to rejoin

1 Sheik Usama.

2 Q. Did Mr. Hamdan talk to you about Usama bin Ladin's plan  
3 regarding the United States of America?

4 A. I'm sorry, his plan?

5 Q. During this, did Mr. Hamdan talk to you about Usama bin  
6 Ladin's plans regarding the United States?

7 A. Yes.

8 Q. And what was that?

9 A. What Salim talked about was Usama's desire to demonstrate  
10 to America that he could threaten America and strike fear and that he  
11 also wanted to demonstrate that he had the ability to strike and kill  
12 Americans anywhere in the world including America itself.

13 Q. Did Salim Hamdan use a phrase to describe how he felt when  
14 he was with Usama bin Laden and working for him?

15 A. Yes, sir.

16 Q. And what was that phrase?

17 A. Uncontrollable enthusiasm.

18 CTC [Mr. Murphy]: Your Honor, with the permission of the court,  
19 I request to hand to the Bailiff what has previously been marked as  
20 our next Appellate Exhibit which I believe is 69, for identification  
21 [sic].

22 MJ: Do you have to show it to the witness?

23 CTC [Mr. Murphy]: Yes, Your Honor.

1 MJ: Okay.

2 CTC [Mr. Murphy]: Ask that it be--all right, I'm corrected,  
3 Your Honor, it's Appellate Exhibit 70 for identification [sic].  
4 [The court reporter marked AE 70.]

5 Questions by the civilian trial counsel, Mr. Murphy, continued:

6 Q. Agent, do you recognize what's marked--or will be marked as  
7 government exhibit 70--government--Appellate Exhibit-- or Appellate  
8 Exhibit 70 for identification [sic]; do you recognize it?

9 A. I recognize it, yes.

10 Q. And what is it?

11 A. This is a DVD of a film clip referred to as the 'Id al-Fitr  
12 speech----

13 Q. Had--go ahead.

14 A. Reported to be the--have been delivered at the Tarnak Farms  
15 facility outside of Kandahar.

16 Q. Have you reviewed the content of that DVD?

17 A. Yes, sir.

18 Q. How did you obtain images contained in this DVD?

19 A. I had learned through my work in investigations and  
20 counterterrorism work that the film in question had been obtained by  
21 U.S. Special Operations Forces in Afghanistan. When I had viewed  
22 this film clip initially it was either in my capacity with the Naval  
23 Criminal Investigative Service, possibly at the Multiple Threat Alert

1 Center with analysts there, or in my work with the Criminal  
2 Investigation Task Force at Fort Belvoir, Virginia.

3 Q. Is it your understanding that that video made its way to  
4 the CITF agent for analysis?

5 A. Yes, sir. As a matter--specifically from the case agent  
6 assigned to the account for Mr. Hamdan advised me about that trail  
7 from Afghanistan to Fort Belvoir CITF.

8 Q. Are you able to recognize individuals depicted on Appellate  
9 Exhibit 70?

10 A. Yes, I am.

11 CTC [Mr. Murphy]: Your Honor, with the Commission's permission,  
12 I request to play Appellate Exhibit 70 at this time.

13 MJ: How long is the video clip?

14 CTC [Mr. Murphy]: This is very short, Your Honor. It's only  
15 about 4 minutes long.

16 MJ: Okay.

17 CTC [Mr. Murphy]: It has a few freeze frames, one of which I'd  
18 like the witness to testify about. I think the substance is about 4  
19 minutes long.

20 MJ: Okay.

21 CDC [Mr. Schneider]: Objection to playing the video until it's  
22 admitted into evidence; objection to its admissibility on lack of  
23 foundation, lack of authentication, relevance, and Rule 403



1 prejudice.

2 MJ: You want to respond to that?

3 CTC [Mr. Murphy]: The government is prepared to address that.  
4 We do believe that it's highly probative. It corroborates----

5 MJ: Now what were the objections again?

6 CDC [Mr. Schneider]: We object on the basis of lack of  
7 authentication, relevance, undue prejudice and lack of foundation.

8  
9 MJ: Okay, I'm overruling the objections as to authentication,  
10 relevance, and Rule 403. Do you want to respond of foundation?

11 CTC [Mr. Murphy]: Yes, Your Honor. This is not obviously the  
12 type of evidence that would require a chain of custody it's not  
13 unique evidence. The government believes that it is sufficient to  
14 show that the videotape was as the agent has testified recovered from  
15 a military operation in Afghanistan. It shows footage, the  
16 government purports, of Mr. Hamdan and Usama bin Laden together and  
17 that the agent based on his training, experience, law enforcement,  
18 and interview of Mr. Hamdan and travels in the region and assignments  
19 to investigate terrorism cases can personally make these  
20 identifications and that it is relevant to the court and it is  
21 particularly relevant to corroborate the many admissions of  
22 association that you have heard, but is an independent source of  
23 showing association between Mr. Hamdan and Usama bin Laden.

1 MJ: Okay. I'll overrule the objection and allow the video to  
2 be played.

3 CTC [Mr. Murphy]: Thank you, Your Honor. I've handed it to  
4 Technical Sergeant [REDACTED] and asked if--with permission of the court  
5 to be displayed to the witness, the panel behind the witness, and  
6 counsel if we may do that?

7 MJ: Yes.

8 **[The court reporter published the video as directed.]**

9 CTC [Mr. Murphy]: Your Honor, may I have the Technical Sergeant  
10 come up and assist me on this?

11 MJ: Yes.

12 **[The prosecution paralegal NCO, Technical Sergeant Gibbs, did as**  
13 **directed.]**

14 CTC [Mr. Murphy]: Your Honor, with the court's permission I'm  
15 going to ask Technical Sergeant Gibbs to stop the video at 10:43:49.

16 MJ: Very well.

17 **Questions by the civilian trial counsel, Mr. Murphy, continued:**

18 Q. Agent, if you see things could you identify them?

19 A. Yes, that's Sheik Usama bin Laden arriving with the brown  
20 cloak over the white shama or gutra.

21 **[END OF PAGE]**

1 Q. All right, I've asked that the tape be frozen and it looks  
2 like we have it at 10:43:48 which is fine. Agent [REDACTED], do you  
3 recognize based on your own personal experience individuals in that  
4 image?

5 A. Yes, sir.

6 Q. And who do you recognize?

7 A. I recognize--okay, two.

8 Q. And if you can--if you would circle the individual as you  
9 identify them.

10 **[The witness did as directed.]**

11 A. This is Usama bin Laden and this is Mr. Salim Hamdan.

12 CTC [Mr. Murphy]: Your Honor, I'd request that Appellate  
13 Exhibit 70, as annotated, be marked as Appellate Exhibit 70A.

14 MJ: Very well.

15 **[The court reporter did as directed and captured AE 70A.]**

16 CTC [Mr. Murphy]: I ask that we continue with the playing of  
17 the tape.

18 **[The court reporter did as directed and continued playing the video.]**

19 **[END OF PAGE]**

20

21

22

23

1   **Questions by the civilian trial counsel, Mr. Murphy, continued:**

2           Q.   And agent, as we continue to play this if you could  
3 describe what you see in the images that you've personally  
4 recognized.

5           A.   Yes.   Again Usama bin Laden with Mr. Hamdan and there's  
6 another bodyguard I recognize, Nassir Ahmad al-Bahri, he's out of  
7 camera range right now; there he is again.   And Usama bin Laden  
8 sitting down.   Again there's Mr. Hamdan to the far left.

9                   I recognize another individual as a bodyguard standing  
10 behind the Sheik.   His name is Nassir Ahmad al-Bahri.   Very quickly,  
11 right there, that's Sayf al-Ald Mazri, the head of Usama bin Laden's  
12 bodyguard detail at the time and here is the Sheik at the podium and  
13 what has been described as the end of Eid al-Fitr, the end of the  
14 Ramadan, commemorating the end of Ramadan at that time in January of  
15 2000.

16           CTC [Mr. Murphy]:   Thank you.   Your Honor, I'm also going to  
17 request to show the witness a couple of documents and a piece of  
18 evidence that already have been admitted into evidence just to have  
19 him comment briefly on it.   With the court's permission I'd ask that  
20 the Bailiff present the witness what has previously been admitted as  
21 Appellate Exhibit 62.

22           CDC [Mr. Schneider]:   Before we depart this last exhibit, do I  
23 understand correctly that only that portion of the video that's been

1 played is in evidence?

2 CTC [Mr. Murphy]: That's the intent of the government along  
3 with the sub-exhibit of 70A in which the agent identified the accused  
4 and Usama bin Laden and circled their images.

5 MJ: Okay.

6 CDC [Mr. Schneider]: And to the extent there is additional  
7 material on it, that is not in evidence; correct?

8 CTC [Mr. Murphy]: That is correct.

9 MJ: Very good.

10 CTC [Mr. Murphy]: Only what was shown on that tape is what's in  
11 evidence.

12 **Questions by the civilian trial counsel, Mr. Murphy, continued:**

13 Q. All right. What is that?

14 A. Sir, this is a film of what's referred to as a capture  
15 video of Mr. Hamdan when he underwent an interview at presumably in a  
16 location in Afghanistan.

17 Q. All right. Have you viewed that video?

18 A. Yes, I have.

19 Q. And in what language does the interview take place?

20 A. The Arabic language.

21 Q. And you were not present at that time; is that correct?

22 A. That's correct.

23 CTC [Mr. Murphy]: Your Honor, I'd like to hand the witness with

1 the court's permission two other documents also which are currently  
2 in evidence, Appellate Exhibits 63 and 64.

3 CDC [Mr. Schneider]: If I may?

4 MJ: You may.

5 CDC [Mr. Schneider]: My intent is to help expedite things.  
6 Those are already in evidence, right?

7 CTC [Mr. Murphy]: Right, I do have just two or three questions  
8 for the witness regarding the exhibits.

9 CDC [Mr. Schneider]: You could ask him----

10 CTC [Mr. Murphy]: Your Honor, may I present these to the  
11 witness?

12 MJ: You may.

13 **[The Bailiff handed AEs 63 and 64 to the witness.]**

14 **Questions by the civilian trial counsel, Mr. Murphy, continued:**

15 Q. This is Appellate Exhibit 63 and 64. Agent, do you  
16 recognize those two appellate exhibits?

17 A. Yes, sir.

18 Q. And what are they?

19 A. What I'm holding is--are two transcripts of two segments of  
20 the interview depicted in the DVD.

21 **[END OF PAGE]**

22

23

1 Q. Did you listen to Appellate Exhibit 62 with both of those  
2 Appellate Exhibits 63 and 64, to determine whether that is a fair and  
3 accurate transcription of the Arabic contained on Appellate Exhibit  
4 62?

5 A. Yes, I did.

6 Q. And is that transcript a fair and accurate English  
7 translation of the Arabic contained in Appellate Exhibit 62?

8 A. Yes, sir. Exactly in my assessment it is an accurate  
9 translation from Arabic into English and transcribed in these  
10 documents.

11 CTC [Mr. Murphy]: Your Honor, if I may just have a moment to  
12 consult with my co-counsel?

13 MJ: You may.

14 **[The prosecution team conferred.]**

15 CTC [Mr. Murphy]: Your Honor, we tender the witness.

16 MJ: Very good, thank you.

17 **CROSS-EXAMINATION**

18 **Questions by the civilian defense counsel, Mr. Schneider:**

19 Q. Good afternoon, Agent [REDACTED].

20 A. Good afternoon, sir.

21 Q. Our request to talk to you before today was declined;  
22 right?

23 A. I wasn't aware, sir, of a request to speak to me.

1 Q. I regret that you were not made aware.

2 A. There was some discussion about defense possibly  
3 requesting, but the request never came my way.

4 Q. Is it unusual in your experience for individuals in  
5 Afghanistan to carry weapons in say the early 2000, 2001 timeframe?

6 A. From what I'm aware of from experience from work not  
7 unusual.

8 Q. You conducted a number of interviews in addition to the one  
9 that occurred at Guantanamo in May 2003; correct?

10 A. That's correct.

11 Q. Let me ask you a question about the one in May. The  
12 indication on the report--have you read the report itself, recently?

13 A. The report of the FD-40 from the interview?

14 Q. Yes, sir.

15 A. Yes, sir.

16 Q. Within the last couple days?

17 A. Yes.

18 Q. Would you agree with me that your report indicates that the  
19 date of the investigative activity was a single day?

20 A. I'm not sure what's reflected in--because the copy I have I  
21 wasn't certain if it contained all the data as to the day or number  
22 of days.

23 CDC [Mr. Schneider]: Request permission to show the witness a



1 page of the report dated May 13--May 17, 2003? I don't intend to  
2 offer it, I'd like to see if it refreshes his recollection.

3 CTC [Mr. Murphy]: No objection, Your Honor.

4 MJ: No objection?

5 CTC [Mr. Murphy]: To showing the agent his own report?

6 MJ: Okay.

7 [The civilian defense counsel, Mr. Schneider, handed the report to  
8 the witness. The witness examined the report. The civilian defense  
9 counsel, Mr. Schneider retrieved the report from the witness.]

10 Questions by the civilian defense counsel, Mr. Schneider, continued:

11 Q. Have you had a chance to look at it?

12 A. Yes.

13 Q. Does that refresh your recollection of--the report has a  
14 single date, even though your testimony is that it covered several  
15 days of interrogation.

16 A. Again, that report--there is a single date that I just saw  
17 in there that said "17 May '03." However, I am uncertain if that  
18 encompasses the entire length of the interview. In fact, that was  
19 the first FD--it's not an FD form, I believe it is a DOD Form 40.  
20 Prior to that, all of my reviews conducted pursuant to U.S.S. Cole  
21 and 9/11 al Qaeda issues were on the FBI FD Form 302.

22 When I mentioned about that I believe----

23 MJ: Okay, I don't think you need to explain that any more.

1 Thank you, sir.

2 Would you go to your next question?

3 CDC [Mr. Schneider]: Yes.

4 **Questions by the civilian defense counsel, Mr. Schneider, continued:**

5 Q. Did you read any interview reports of interviews conducted  
6 of Mr. Hamdan before you commenced yours?

7 A. I may have, but I cannot recall.

8 Q. Do you know how many were conducted before you commenced  
9 yours?

10 A. No, sir.

11 Q. Did Mr. Hamdan indicate to you that when he transported  
12 weapons they were from the Taliban?

13 A. From the Taliban warehouse.

14 Q. Taliban warehouse?

15 A. Yes.

16 Q. Is it true that Mr. Hamdan identified for you at your  
17 request various individuals whom you interviewed?

18 A. Yes, sir.

19 Q. Did you take any notes of your interview?

20 A. There were notes taken, yes, sir.

21 Q. Were they taken by you?

22 A. Not exclusively. In fact, from what I recall I think  
23 primarily by Mr. [REDACTED].

1 Q. Have you ever reviewed those notes?

2 A. Not since the time of actually compiling the report and the  
3 Form 40. I have not seen them since that time.

4 Q. Do you know where they are?

5 A. Exactly? No, sir. Other than a guess. If asked to guess,  
6 in the case file with the Criminal Investigation Task Force.

7 Q. Do you have any personal knowledge about the circumstances  
8 of the activities in which Mr. Hamdan was engaged in late November  
9 2001, at or about the time he was apprehended?

10 A. Did you say, sir, personal activities?

11 Q. Yes--personal knowledge.

12 A. Personal knowledge of his activities around the time of  
13 capture?

14 Q. Correct.

15 A. In late November of '01? Yes. Yes, sir. According to  
16 what Mr. Hamdan had conveyed.

17 Q. Anything in addition to what you told us today?

18 A. There was some more details about that activity. Yes, sir.

19 Q. Did--to your knowledge, did Mr. Hamdan cooperate in  
20 providing information to you?

21 A. I would term the entire length of our interview as an  
22 atmosphere of cooperation.

23

1 Q. Are you aware that he showed the investigators sites in  
2 Afghanistan before he was transported?

3 A. Before he was transported here?

4 Q. To Guantanamo.

5 A. I can't recall an awareness of that; no, sir.

6 Q. Do you have any information about the integration of Arab  
7 fighters and the Taliban cause in Afghanistan in 2000, 2001?

8 A. I'm not sure--or I'm sure I would not use the term  
9 "integration." I know that frequently, if not consistently so-  
10 called Afghan Arabs fought against the forces of Ahmad Shah Masoud  
11 with the Northern Alliance, but I'm not really aware of an actual  
12 integration if you refer to integrated forces.

13 Q. You were aware that they were on the same side in that  
14 conflict?

15 A. I would agree with that.

16 CDC [Mr. Schneider]: No further questions, Your Honor.

17 MJ: That was an excellent cross-examination.

18 CDC [Mr. Schneider]: Thank you very much, Your Honor.

19 MJ: Marked for its brevity as well as for its excellence.

20 CDC [Mr. Schneider]: May I order a transcript?

21 MJ: I will pay for a transcript.

22 CTC [Mr. Murphy]: No further questions from the government,  
23 Your Honor.

1 MJ: Excellent. Thank you, sir, for your testimony.

2 I guess we can excuse this witness then to return to his  
3 duties?

4 PROS: You may, Your Honor.

5 CDC [Mr. Schneider]: Yes.

6 MJ: Fly back to the states, if necessary? If he can find an  
7 airplane?

8 Thank you, sir.

9 Okay, it's quarter to 6. I think we've used 45 minutes of  
10 the interpreter's attention. I've ordered out my dinner and I'm  
11 going to stay in the courthouse. I would ask counsel what their  
12 plans are and how much time they need. Mr. Hamdan needs a meal and  
13 we have another witness to take tonight. I'm not sure I'm ready to  
14 hear an hour and a half of direct examination from any witness, so  
15 what do you think about dinner?

16 PROS: Dinner is always a good thing, sir.

17 MJ: Dinner is a good thing. Well, has Mr. Hamdan--a meal been  
18 brought here for him?

19 CDC [Mr. Swift]: That would be the guard force.

20 MJ: I want to make sure he gets dinner.

21 CDC [Mr. Swift]: Yes, sir. My suggestion--my understanding is  
22 that tomorrow morning, as long as we end by 12, the flights were  
23 arranged to do that. In the spirit of brevity move with the

1 essential points of our expert tomorrow morning we'll be ready  
2 technically to go briefly as I anticipate it is our last witness.

3 MJ: You anticipate it will be your last witness? The  
4 professor--Professor Williams?

5 CDC [Mr. Swift]: Yes.

6 MJ: So you're suggesting that we just wrap it up for the night?

7 CDC [Mr. Swift]: Yes, sir.

8 MJ: Reconvene in the morning?

9 CDC [Mr. Swift]: I think that everybody is tired.

10 MJ: I don't want to necessarily restrict your presentation of  
11 evidence, a 90-minute direct examination struck me as perhaps more  
12 detail about Afghan fighting practices than I would need to decide  
13 this motion. Maybe not. What time do you want to start in the  
14 morning? I'll leave that up to you. How much evidence to present?

15 CDC [Mr. Swift]: Talking with my counsel, we'd like to start  
16 tonight.

17 MJ: You'd like to start tonight.

18 CDC [Mr. Swift]: So an hour break for dinner and then start.

19 MJ: Return at 7 then?

20 CDC [Mr. Swift]: 7:30, Your Honor?

21 MJ: Okay.

22 PROS: Your Honor, to make things easy on the court as well,  
23 with regard to our last and final witness, what I would like to do is

1 approach the defense. We have three documents we believe that if  
2 they can stipulate these into evidence then the government will rest  
3 at the conclusion.

4 MJ: So you want to talk about that over the break.

5 PROS: We can do that, yes, sir.

6 MJ: What did you decide to do with those two photographs that  
7 were marked secret? Kind of authenticated, but then you took them  
8 back to your desk.

9 PROS: As they say in the business, having tempted fate, I'm  
10 going to; unfortunately, ask that you allow us to withdraw those two  
11 exhibits. And for the record, those would be Appellate Exhibits 66,  
12 and--what was the other?

13 COURT REPORTER: 61 and 66.

14 PROS: 61 and 66? Yes. I would ask the court's permission to  
15 withdraw those at this time.

16

17 MJ: Very well. That's granted. We'll just leave those in the  
18 classified safe somewhere.

19 PROS: Yes, sir. Thank you.

20 MJ: 7:30 okay for the government?

21 PROS: Yes, sir.

22 MJ: Okay. Court's in recess then until 7:30.

23 **[The R.M.C. 803 session recessed at 1750, 6 December 2007.]**

1 [The R.M.C. 803 session was called to order at 1933, 6 December  
2 2007.]

3 MJ: Court is called to order. Let's see, all parties present--  
4 --

5 CDC [Mr. Swift]: She's here, Your Honor.

6 MJ: ----are once again present.

7 I believe we were ready to turn the--you had some  
8 documents----

9 PROS: Yes, sir.

10 MJ: ----that you and the defense were going to discuss.

11 PROS: Yes, sir. We have discussed in the recess these three  
12 documents, and in order of tender, the first is Appellate Exhibit 71  
13 which is United States District Court Western District of Washington  
14 at Seattle, a declaration which was made by Mr. Hamdan and we would  
15 tender that as Appellate Exhibit 71.

16 CDC [Mr. Schneider]: No objection.

17 MJ: Okay.

18 PROS: For the record, the second document is Appellate Exhibit  
19 72. It is an ICE U.S. Citizenship and Immigration Services document,  
20 an interoffice memorandum relating to Mr. Hamdan. I would tender  
21 this as Appellate Exhibit 72 for proof of lack of citizenship.

22 CDC [Mr. Schneider]: No objection.

23 PROS: And finally, Appellate Exhibit 73 which is entitled



1 "Speech by President Address to Nation on Terror." That would be an  
2 August 20th 1998, address to the nation by President Clinton,  
3 Appellate Exhibit 73.

4 CDC [Mr. Schneider]: No objection.

5 MJ: Very well.

6 PROS: And at this time, Your Honor, I present these to the  
7 court.

8 MJ: Great. These are the official copies. Okay. Is that the  
9 end of the government's evidence on the motion?

10 PROS: Yes, sir. At this time the government rests.

11 MJ: Thank you.

12 Mr. Swift.

13 CDC [Mr. Swift]: Yes, sir, a few matters.

14 MJ: Okay.

15 CDC [Mr. Swift]: One, in light of your earlier ruling regarding  
16 the videotape which among things the agent pointed out Nasser al-  
17 Bahri who we wanted to call and you ruled he was irrelevant at that  
18 time?

19 MJ: This is one of the Yemeni witnesses?

20 CDC [Mr. Swift]: Yes. The agent pointed out in the video shown  
21 by the government, Mr. al-Bahri, Mr. Hamdan's brother-in-law was  
22 someone he knew and he testified about that period of time. The  
23 court considered that that period of time was irrelevant and in its

1 consideration I would wonder if the court would reconsider its ruling  
2 that this testimony is irrelevant.

3 MJ: Was this witness number 7 on your list? I'm sorry, I don't  
4 remember the name.

5 CDC [Mr. Swift]: Yes, Your Honor.

6 MJ: I didn't add that witness primarily because it was  
7 untimely. He is in Yemen and cannot be produced for this hearing.

8 CDC [Mr. Swift]: Telephonic?

9 MJ: If you can reach him telephonically, I'm happy to hear his  
10 testimony telephonically.

11 CDC [Mr. Swift]: No longer--he is now deemed as relevant if we  
12 can produce him telephonically at this point, Your Honor?

13 MJ: Well I am not sure if he is relevant, but I'll let you call  
14 him telephonically if you have time to do that.

15 CDC [Mr. Swift]: Yes, Your Honor. The next one is to report on  
16 our portion which we mentioned in the 802, the facilitator which you  
17 granted us access to. As I reported in the 802 we discovered that he  
18 was represented by counsel. We contacted his counsel as we were  
19 ethically required to do. His counsel indicated that he could be  
20 here next week if the government facilitates us, and during the  
21 interview that witness--or detainee indicated to us that he was  
22 willing to talk to us, he just wanted his attorney here. And in that  
23 case as we would like to put on his testimony particularly in light

1 of the testimony of Special Agent [REDACTED].

2 [REDACTED] put to Your Honor or to questioning he said Mr.  
3 Hamdan must have been involved or in al Qaeda because no one could be  
4 that close unless they were in al Qaeda. And based on my previous  
5 interview of him in 2004, I believe that he would testify that around  
6 bin Laden were many people who disagreed with him. Many people who  
7 weren't in al Qaeda, and some of them were in the bodyguard and  
8 security force with regards to his terrorist activities that bin  
9 Laden fought as part of the Northern Alliance and will put testimony  
10 on that. And there are lots people willing to do that against the  
11 Northern Alliance. It did not necessarily support the outside  
12 activity.

13 He did not say nor do I know that he knows for sure that  
14 bin Laden--whether Hamdan was one or not one of those; he wouldn't  
15 say that either way. He simply did not know. He--sometimes the  
16 membership was secret, but his belief was that he had been here to  
17 fight in Tajikistan and he was principally a driver and----

18 MJ: Where are you going with this, cut the argument? What is  
19 it that you are asking the court to do about the facilitator?

20 CDC [Mr. Swift]: What we would like--we would seek a  
21 continuance to at least see if we can obtain his testimony. We've  
22 moved on this really as fast as we can throughout the process and we  
23 would like to seek continuance on the evidence. What we would

1 propose is that we continue the hearing but that we have some period  
2 of time in the hearing--after the hearing to still submit some  
3 evidence or to ask the court to hear his testimony if it is  
4 available.

5 I don't want to mislead the court and say that he won't  
6 seek immunity or that I could even get immunity in his case. I'm  
7 going to be realistic. I don't know what he would do.

8 MJ: How long of a continuance do you have in mind?

9 CDC [Mr. Swift]: I would think a period--if the government can  
10 get his attorney down here next week, if that can be facilitated.  
11 Then his attorney is concerned about that portion. If the government  
12 can get him down here next week, then we will know what he will do by  
13 the end of the week.

14 MJ: Okay.

15 CDC [Mr. Swift]: And we can tell the court at that point  
16 whether we want to hear the testimony or not. And we would seek  
17 simply to keep the hearing open until such time which we could advise  
18 the court. If he is not going to be available, then we are not going  
19 to a play game and say he will when he won't.

20 CTC [Mr. Murphy]: Your Honor, if I may argue from counsel  
21 table. We would oppose a continuance and we also oppose the  
22 suggestion of this attorney coming here. It's the United States'  
23 position that this attorney Mr. Swift is referring to is a habeas

1 counsel to this individual. We do not recognize that that counsel  
2 represents this detainee for these proceedings.

3 Now on the issue of continuance, we think that is  
4 unnecessary delay. We recognize, however, that the issue of  
5 jurisdiction, if new evidence were to develop and it genuinely could  
6 be brought as a new motion, is something that the court could  
7 entertain at any time. So we think it is unnecessary to hold open  
8 this hearing for some speculative possibility that there might be  
9 some evidence that bears on jurisdiction. If that happens, the  
10 defense could file a motion based on new evidence and it could be  
11 reconsidered properly by the court. But certainly continuing this  
12 matter would only be unnecessary delay at this point, and that is the  
13 position of the United States, Your Honor.

14 MJ: Okay. I like that position. I think I will go ahead and  
15 make my decision at the conclusion of the testimony that I receive  
16 during this session at Guantanamo Bay, and if you come across new  
17 evidence that suggests a reconsideration is appropriate, then you can  
18 file a new motion and present the testimony of this gentleman at our  
19 next session in Guantanamo Bay. If you can resolve the issues of  
20 immunity and access and relevance of his testimony.

21 CDC [Mr. Swift]: With regards to the United States and its  
22 position that his counsel is irrelevant, the court leaves us in a  
23 quandary. If I take on that position and simply go interview him,

1 I'll violate my state ethics. I would hazard to say that so would  
2 the prosecution. They may take the position and I don't disagree  
3 that he is not a counsel in these proceedings. That's a position----

4 MJ: This I am not prepared to resolve the ethical issue of  
5 whether he is a habeas counsel or a counsel for the proceedings. I  
6 am simply not going to continue the hearing to another date so that  
7 those things can be worked out.

8 CDC [Mr. Swift]: Yes, Your Honor.

9 MJ: Okay. So if you can work them out and some relevant  
10 testimony becomes available----

11 CDC [Mr. Swift]: The United States controls it and can deny us  
12 attorney access to him and that ends it effectively denying us  
13 access. And if that's what happens, we'll re-alert this court and  
14 argue that.

15 MJ: Okay.

16 CDC [Mr. Swift]: It's an effective denial.

17 MJ: That sounds like the way to do it.

18 CDC [Mr. Swift]: Yes, Your Honor. One note that I was asked to  
19 put on the record that I misspoke earlier when I said that Said  
20 Boujaadia's attorney--habeas attorney was not present. He was in  
21 fact present in the spectators of the courtroom, and I was  
22 misinformed that he was not here. I was under the impression he  
23 wasn't going to be here, and then I find that he was.

1 MJ: Mr. Boujaadia's habeas counsel was present in the courtroom  
2 when he testified?

3 CDC [Mr. Swift]: He was.

4 MJ: Okay. Thank you.

5 CDC [Mr. Swift]: At this time the defense would call Dr. Brian  
6 Williams.

7 MJ: Very good. Does the bailiff know where he is?

8 Okay, he's here in the courtroom. Please step forward, Dr.  
9 Williams.

10 Trial Counsel, will you swear the witness, please?

11 **BRIAN WILLIAMS, civilian, was called as a witness for the defense,**  
12 **was sworn, and testified as follows:**

13 **DIRECT EXAMINATION**

14 **Questions by the civilian defense counsel, Mr. Swift:**

15 CDC [Mr. Swift]: Would you please publish to counsel's table  
16 and to court Mr. Williams' CV?

17 **[The court reporter published the document as requested.]**

18 MJ: I've already reviewed the CV. Are you proposing to offer  
19 this witness as an expert?

20 CDC [Mr. Swift]: I was going to offer it simply as an appellate  
21 exhibit into----

22 MJ: Okay. Does the government have any objections?





1 **Questions by the civilian defense counsel, Mr. Swift, continued:**

2 Q. Before going there, Dr. Williams, briefly can you explain  
3 how you got interested in subject areas of transnational jihadism,  
4 terrorism, et cetera?

5 A. Yeah. It came about in the late '80's, early 90's. I was  
6 living in Bosnia. I later lived in Kosovo. I also spent time in the  
7 field living with a small exile group living in the Crimean Peninsula  
8 in what is today the Ukraine. What I did was I analyzed how these  
9 small, Muslim ethnic groups confronted repression by larger Christian  
10 or non-Muslim groups such as the Russians in Chechnya, or the Serbs  
11 in Bosnia, or the Soviets in Afghanistan. So sort of comparative  
12 work on how these groups fought back against groups like the Soviets,  
13 the Russian federal troops and the Serbs in Bosnia.

14 Q. Prior to 2001--September 11, 2001, what was your study of?

15 A. I earned my PhD in Central Asia, so I focused on the "-  
16 stans"----

17 MJ: Dr. Williams, you need to go slower.

18 WIT: Okay.

19 **Questions by the civilian defense counsel, Mr. Swift, continued:**

20 A. I focused on the stans. This is Afghanistan, Khazkstan,  
21 Kirgizstan, the sort of republics of central Asia. By '99 I was  
22 analyzing small groups of foreign fighters who were coming to fight  
23 on behalf of some of these other peoples against their enemies.

1 Q. Did your work get much attention then?

2 A. Not really. It was sort of an academic subject. It was  
3 not important to Americans to study the Taliban, to study al Qaeda or  
4 to study these groups of foreign fighters that I--they don't have a  
5 name for. If I had a name for them, I called them the Azzam brigades  
6 after a man named Agul Azzam, a sort of a patron saint of the modern  
7 jihad movement.

8 But there wasn't that much interest in America or Britain.  
9 I was living in London at the time. These are foreign fighters who  
10 seemed to be roaming from country to country waging jihad and helping  
11 out victimized or repressed Muslims in places like Chechnya or Kosovo  
12 or Bosnia or even Kashmir.

13 Q. After 9/11, did that change?

14 A. Overnight. This sort of arcane subject suddenly became  
15 very mainstreamed, to say the least. Suddenly this small field that  
16 I had been devoting my life to since the late '80's suddenly was  
17 propelled into the media. It certainly impacted me in my own  
18 studies.

19 What I thought was interesting is some of these groups that  
20 I had been studying--in some cases for over 10 years--suddenly were  
21 all described in broad brush strokes as "al Qaeda" and I'd known many  
22 of these and traced them for years long before the existence of this  
23 group al Qaeda. So this sort of began a whole process of trying to

1 explain the nuances of these various fighting units in Afghanistan,  
2 and Chechnya, and Bosnia.

3 Q. In doing your work--coming to attention--draw to the sense  
4 that you consulted for the CIA most recently.

5 Can you briefly describe what you were hired to do in that?

6 A. I was hired to go to Afghanistan in April and May. My  
7 mission sort of was to trace suicide bombers who were coming into  
8 Afghanistan and trace how this alien or almost taboo tactic had come  
9 from the Iraqi theater of operations over to the so-called forgotten  
10 war in Afghanistan.

11 Q. You told us that you also did consulting for the joint  
12 information operations warfare consultant team for the Afghan  
13 insurgency. When was that?

14 A. That began last year and it continues to the present. It  
15 was basically focusing on Afghanistan again.

16 Q. The Jamestown Foundation. What's that?

17 A. That's a think tank in Washington, DC that runs several  
18 publications focusing on violence, insurgencies, conflict, and of  
19 course, terrorism in Eurasia.

20 Q. And with Scotland Yard?

21 A. That was work I did from 1999 to 2001. Specifically I was  
22 looking at the issue of the Chechens; their struggles against the  
23 Russians, and were there any links between Chechens and al Qaeda.

1 Were they using surface to air missiles, SAM-7's, stingers, et  
2 cetera, to be used against civilian airliners.

3 CDC {Mr. Swift}: Move on to the next slide, please. Can we  
4 publish this to the counsel, judge, and then to the witness, please?

5 MJ: Yes.

6 **[The court reporter published the document as directed.]**

7 **Questions by the civilian defense counsel, Mr. Swift, continued:**

8 Q. Your field work--and I just want to draw in part,  
9 particularly in Afghanistan. It shows that you went there three  
10 times in 2003, 2005, and 2007; is that correct?

11 A. That's correct.

12 Q. If we could move to the next slide. I'd like to talk about  
13 some of your field work in Afghanistan. Are you seeing the screen  
14 right now?

15 A. Yes, I am.

16 Q. Do you recognize that picture?

17 A. Yes, I do.

18 Q. When was that picture taken?

19 A. This was taken in August of 2003.

20 Q. And it was during your field work in Afghanistan?

21 A. Yes, it was.

22 CDC [Mr. Swift]: I'd move for this to be admitted into  
23 evidence.

1 MJ: This photograph?

2 CDC [Mr. Swift]: Yes.

3 MJ: As the next appellate exhibit?

4 CDC [Mr. Swift]: As the next appellate exhibit, Your Honor.

5 PROS: No objection, Your Honor.

6 **[The court reporter captured the evidence as AE 074.]**

7 CDC [Mr. Swift]: If we could go ahead and publish it up on the  
8 big screen?

9 MJ: You may.

10 **[The court reporter published AE 074 as directed.]**

11 **Questions by the civilian defense counsel, Mr. Swift, continued:**

12 Q. You're carrying a rifle. Why?

13 A. Well this was just after the collapse of the Taliban and we  
14 were in the very unstable provinces of the north of Afghanistan. At  
15 this time period there were still small splinter groups of the  
16 Taliban in the area. Northern Alliance warlords were fighting and I  
17 was a lone American traveling by myself across the provinces.

18 My Uzbek hosts were worried about my personal safety.

19 There were worried that someone might kidnap me at checkpoints, or  
20 perhaps kill me. So as a deterrent, I was encouraged to have my own  
21 Kalashnikov rifle.

22

23

1 Q. Is it fair to say that a lot of people were carrying rifles  
2 in Afghanistan then?

3 A. Yeah. The country was literally awash in small arms. AK-  
4 47s were everywhere.

5 Q. Now to be sure, to focus--this trip in 2003, you did not go  
6 with U.S. forces or part of U.S. forces?

7 A. No, I did not. I was completely on my own.

8 Q. Move to the next slide, please. In 2000--do you recognize  
9 this photo?

10 A. Yes, I do.

11 Q. When was this photo taken?

12 A. This was taken in April of this year.

13 **[The photo was inadvertently published to the courtroom at large.]**

14 PROS: I'll make it easy. We don't object.

15 **Questions by the civilian defense counsel, Mr. Swift, continued:**

16 Q. On this photo, were you--where was that photo taken?

17 A. This was, as you can see, taken just outside the town of  
18 Darunta. Darunta is a town in the Tora Bora mountains near  
19 Jalalabad, which means it's in the tribal areas on the frontier  
20 between Pakistan and Afghanistan. This is area also where Usama bin  
21 Laden had one of hi major facilities or compounds. Specifically this  
22 is the compound--you may have seen the video images of al Qaeda  
23 experimenting with nerve gas, and they were actually using nerve gas

1 in this very sick video to kill animals. So they were practicing--  
2 essentially weapons of mass destruction in this town and they also,  
3 according to some of the intelligence did a lot of the major planning  
4 for 9/11 in this compound or this facilitate at Darunta.

5 Q. Did you visit the facility?

6 A. I visited what was left of it. It had been torn up pretty  
7 bad by JDMS, laser-guided bombs, et cetera.

8 Q. On this trip, were you there at the request of the United  
9 States government?

10 A. Yes, I was.

11 Q. Next slide, please. Excuse me--that was admitted into  
12 evidence?

13 PROS: That's fine, admit it.

14 MJ: You want to offer all these photographs into evidence on  
15 the motion?

16 CDC [Mr. Swift]: Yes, I do.

17 MJ: Does the government have any objection to any of these  
18 photos?

19 PROS: Your Honor, on any of these travelogue-type photos  
20 showing the witness posing in various locations--they're nice photos.

21 MJ: Well what's the relevance of them?

22 CDC [Mr. Swift]: We admit them in to establish that he's  
23 actually been to the areas he's going to talk about.

1 PROS: We wouldn't contest that he was there.

2 MJ: The government concedes that. I don't mind admitting them,  
3 but I'm eager to get to the meat of the testimony.

4 CDC [Mr. Swift]: Yes, Your Honor.

5 MJ: And with the government's concession that he's been to all  
6 of these places, that should be very interesting.

7 CDC [Mr. Swift]: If we can move on again.

8 MJ: Yes.

9 **Questions by the civilian defense counsel, Mr. Swift, continued:**

10 Q. Let's go ahead and skip through these to talk about in this  
11 picture, the Taliban military. Do you recognize what that is?

12 A. Yes, I do.

13 Q. What is it?

14 A. That's the battle standard of the Taliban Army, the Al  
15 Raya--I'm sorry, this is the Al Raya of the Arab Brigade which was,  
16 of course, a component of the Taliban Army.

17 Q. When did they adopt that battle standard?

18 A. Well the first sign I saw of it in Afghanistan was in April  
19 of 1997.

20 Q. Move to the next slide, please. Can you tell me what this  
21 is a picture of?

22 A. These are foreign fighters sort of doing military maneuvers  
23 or practicing under the banner of the Al Raya, the black battle



1 standard of the al Qaeda or Ansar units that fought within the  
2 Taliban Army after '97.

3 Q. I would like to move the photo into exhibit, Your Honor.

4 PROS: Into evidence? We have no objection.

5 MJ: Very well. What number will be assigned to this one?

6 COURT REPORTER: Seventy five.

7 MJ: This will be Appellate Exhibit 75.

8 **[The court reporter captured the evidence as AE 075.]**

9 **Questions by the civilian defense counsel, Mr. Swift, continued:**

10 Q. Can you explain to me the relevance of this photo?

11 A. This is the group I was studying in '97, '98, '99, 2000. I  
12 found them fascinating because this was this bona fide frontal  
13 fighting force that I have been monitoring in Afghanistan every since  
14 they had swept to the north. I ended up analyzing their tactics,  
15 their integration with the main Taliban army. So here we have a bona  
16 fide photograph of the Ansar's which means "supporters," practicing  
17 for warfare in Afghanistan prior to 9/11.

18 Q. If you could move to the next slide. Now this 055 Brigade-

19 ---

20 MJ: I beg your pardon. This you said before 9/11?

21 WIT: That's correct, sir.

22 MJ: Okay.

1   **Questions by the civilian defense counsel, Mr. Swift, continued:**

2           Q.   What is it made up of?

3           A.   It was this fighting force between 2- and 3,000 people at  
4   that early stage and it was made up predominantly of Arabs. But in  
5   addition to Arabs, there was a large component--perhaps 7-, 800  
6   ethnic Uzbeks--coming from Uzbekistan as well as Weelers, these are  
7   Muslims coming inner-China; some small numbers of ethnic Chechens,  
8   and also perhaps some Pakistanis from various Pakistani jihad  
9   outfits.

10          Q.   If you could move to the next slide. I'd like to direct  
11   your attention to talk about these categories: organization,  
12   training, uniforms, their weapons and tactics, generally. If you  
13   could move to the next slide, please. Let's talk about the  
14   organization. Who is this a photo of?

15          A.   This is Abu Yahya al Libi who is a major commander--  
16   obviously, as the name indicates--from Libya who was one of the  
17   commanders of both bases and fighting units in Afghanistan for the al  
18   Qaeda Ansars.

19          Q.   When did he take command, or rise to prominence?

20          A.   Well one of the first times I encountered his name was in  
21   '98, so I would assume that sometime in that broad area there.

22

23

1 Q. What was his experience?

2 A. He was somebody who comes from North Africa. He had  
3 military background. He ended up in Afghanistan. There were  
4 accounts of him somehow playing a role during the 1980s in the famous  
5 jihad against the Soviets as well.

6 Q. When you say "commander," explain what that means. What  
7 was he in the terms of a commander?

8 A. This term applies to--they call them "commandans." There  
9 are various commandans who led the various--I guess you call them  
10 platoons, divisions, whatever within the Ansar Army. These are men  
11 who led small units or larger units. Usually the shock troops that  
12 were forming the sort of vanguard of the Taliban forces.

13 Q. Were the people under his command responsible to him?

14 A. Yes, they were.

15 Q. Were they expected to follow his orders?

16 A. Very strictly. This was one of the most strict command  
17 orders in Afghanistan in the time period.

18 Q. If we can move to the next slide. I want to over the  
19 points of that--of the organization. In the command structure, you  
20 testified that they had a chain of command; is that correct?

21 A. That's correct.

22

23

1 Q. They typically had formal training?

2 A. Well that's what's interesting about the Ansars--or the al  
3 Qaeda 055 brigade--is that many of them had been trained in Saija. A  
4 lot of them were Egyptians, for example, and a lot of them had  
5 previous military experience fighting in various forces in the Arab  
6 Middle East. So they did have formal military training before coming  
7 to Afghanistan.

8 Q. Now I want to go back and your point toward the 055. Where  
9 did that come from?

10 A. That's an interesting designation. It was actually the  
11 designation for an Afghan Communist Army fighting unit. But what  
12 typically happened was when the Afghan Communist Army collapsed in  
13 1992 and mujahedin, that is the freedom fighters, conquered the  
14 country, these various units began assuming the old nomenclature, the  
15 designation, of the previous fighting units. When the Taliban  
16 subsequently conquered the country from '96 until 1999, they also  
17 assumed a lot of the barracks, the fighting structures, and of course  
18 the names of the actual fighting units that had been fighting on the  
19 side of the communist--the Afghan government--back in pre-1992.

20 [END OF PAGE]

21

22

23

1           Q.    In the command structure. Can you comment on beyond what  
2 we already did--and we've gotten a little bit out of order, I  
3 apologize--that--you said earlier that they were expected to follow  
4 orders. How did they impose discipline?

5           A.    Well we have had stories of corporal punishments, execution  
6 for retreating from a battle. If any Americans encounter these  
7 people, they found some fighters that were very, very strongly  
8 disciplined. The command structure was firmly in place. When they  
9 were told, for example, and I heard this story from a leader named  
10 "Masoud, the Lion of Panjsher," his people. He was a great mujahedin  
11 leader. He said that when these foreign fighters--that is, the  
12 Arabs--were given orders to storm across minefields, they didn't  
13 hesitate. They would storm across the minefields blowing themselves  
14 up to clear a path for the Taliban, the envisionist fighters who  
15 would subsequently storm across this bloody swath carved by these  
16 foreign fighters. So they, of all the fighting units in Afghanistan  
17 had very, very uniquely strict leadership and command.

18          Q.    Was there any report of them during this period of time  
19 attacking civilians?

20          A.    They had a reputation for ferocity in battle, for almost  
21 suicidal bravery, for refusing to surrender, for tenaciously holding  
22 their post. They were feared, but the only account I have of them  
23 being involved in any sort of attacks on civilians is an account from

1 the Hindu Kush Mountains, a small village called Yakolang. In this  
2 case, a Taliban army conquered this Shiite Hizar village and there  
3 were reports of between 20 and 30 people being massacred, and  
4 apparently some Arabs were involved in both the conquest of that town  
5 and in that subsequent reprisal or massacre. But when you compare  
6 them to, say, the Northern Alliance, we have massacres of thousands  
7 and thousands of people. No. For all their ferocity in battle,  
8 there is strikingly little evidence of them having done anything like  
9 ethnic cleansing or mass massacres.

10 Q. How did the west feel about that? Prior to 9/11, what were  
11 military publications saying about the 055?

12 A. I'm a regular reader of Jane's Military and they had some  
13 interesting articles on this fighting force that I used myself in  
14 1999 and 2000 and even 2001. Of course, Jane's is very respected  
15 amongst military people and they had some fascinating articles on the  
16 way that this fighting force had been integrated into the command  
17 structure of the Taliban army. The ways they fought, the weapons  
18 they used, the tanks, the heavy, light artillery, their infantry  
19 fighting tactics. So they had a lot of information about the ways  
20 that these Arab units fought frontal combat in Afghanistan.

21 [END OF PAGE]

1           Q.    I'd like to show you a quote from Jane's.  We'll move on.  
2 Can you identify that for me, please?

3           A.    Yes.  This is almost the inverse of the Al Raya banner.  It  
4 says, "la ilaha illa Allah wa ashhadu anna Muhammad rasulu Allah."  
5 This is the quote from the Quran, "There's only one God and Mohammed  
6 is his prophet."  This is the actual white battle standard that was  
7 used by the major Taliban armies.  So whereas the foreign component,  
8 that is, the Ansars, fought under the black banner, the main Taliban  
9 army fought under the white banner, the al Liwa battle standard.

10          Q.    When you say they fought under the battle standard, did  
11 they actually have it on the battlefield?

12          A.    Well from the eyewitnesses--I've never seen them in battle  
13 myself--but I lived with General Dostum who was a very infamous  
14 Northern Alliance commander in the north and he described a very  
15 powerful scene that he himself encountered.  This was in April of  
16 1997 and for the first time in Afghanistan, these mysterious foreign  
17 fighters had been witnessed in combat.  And what General Dostum saw  
18 was thousands and thousands of Taliban sweeping across the plains of  
19 the north coming towards them and leading these Taliban fighters were  
20 Arabs.  The Arabs were fighting under black banners and the Taliban  
21 were fighting under the white banner.

22

23

1 Q. Were they fairly recognizable in the distance?

2 A. Well they saw them from far away and knew that one group  
3 was the Taliban and one group was the foreign fighters. So they see  
4 from far away.

5 Q. Let's talk briefly about the Taliban military. How as it  
6 organized?

7 A. Once again they adopted the regiments, the names, the  
8 fighting structures of the armies that were in place when they took  
9 control of the country. They adopted the names of the ministries;  
10 health ministry, et cetera, and they did the same thing with the  
11 Army. They followed the same command structure, often having the  
12 same "kanak," that means "battalions," the same names, the same  
13 barracks. So there was a certain continuity in Afghanistan even  
14 though you had different governments come into power, you know, the  
15 Afghan communist government, the mujahedin, and then, of course, the  
16 Taliban.

17 Q. There's been this perception that they're just a bunch of  
18 guys with turbans wrapped around their heads with a few AK-47's  
19 standing out in the field and that was the order of battle, some sort  
20 of a tribal battle force. Is that accurate?

21 A. No it is not. In fact, I've seen lots of Taliban  
22 airplanes--these are, of course, by Americans standards very  
23 outdated, but they had a bona fide air force consisting of MIG-21's,



1 Fishbeds, Sikhoi 22's, they had Mil-8's Hip helicopters, and of  
2 course, the Taliban had the best artillery in Afghanistan. They are  
3 Pakistani trained. They had T55 tanks, T62 main battle tanks; they  
4 had multiple rocket launcher systems like the Katyusha, the organ  
5 system. So this was a very effective, large, frontal and  
6 conventional fighting force.

7 Q. Their command structure?

8 A. Once again it followed the regimented patterns of the pre-  
9 existing communist army often using the same ranks, the same tactics,  
10 the same manual, et cetera.

11 Q. Did they live in barracks?

12 A. They most certainly did, yes. In fact, the barracks were  
13 some of the main targets for the Americans at the beginning of  
14 Operation Enduring Freedom.

15 Q. Now was their army just independent--did whatever it  
16 wanted, or did it report to a central government?

17 A. It reported to the shura, you call it the counsel or the  
18 parliament of the country, which then ordered them into battle.

19 Q. I'm showing you two photographs now. Do you recognize  
20 those?

21 A. Yes. On the left here we have Taliban T-62 main battle  
22 tanks that were hit by JDMS or laser-guided bombs on the Somali  
23 plains. This is just north of Kabul. And on the right we have a

1 Taliban Sukhoi-22 fighter bomber which was hit by an American cluster  
2 bomb in November 2001.

3 Q. So basically these are remnants of the Taliban army that  
4 was destroyed in the action beginning in October 2001?

5 A. That's correct.

6 Q. Which supports the reports that they had aircraft and order  
7 of battle tanks, et cetera. The remnants of them are left on the  
8 Afghan battlefield.

9 A. Correct.

10 Q. I want to talk about whether the integration of the 055  
11 into the Taliban army. Is it fair--the first question is in this is,  
12 did the 055 operate independently?

13 A. No. This was a very, very strong point that the Taliban  
14 were very, very concerned with. This is an issue of sovereignty.  
15 Now the Taliban did not want Usama bin Laden creating a state within  
16 a state. They had that control of all fighting forces in their  
17 country, and they made sure that this foreign fighting force came  
18 under their chain of command. This was something that was very  
19 important to the Taliban.

20 Q. I'm showing you a quote from Jane's that basically  
21 recognized that. Would you agree with that?

22 A. Yes, I would.

1           Q.    And if you could, briefly--it indicates here that they made  
2 up a quarter of the Taliban's entire fighting force. Does that  
3 comply with your own studies?

4           A.    Yes, it does, especially in the final years when the number  
5 of Arab fighters swelled and they began to assume more and more of a  
6 crucial role in the Taliban's battles against the Northern Alliance.

7           Q.    When did the war start with the Northern Alliance and the  
8 Taliban?

9           A.    Well it began in about 1996 when they first moved against  
10 the town Harat. But it really picked up and became a major war in  
11 1998.

12          Q.    When did Usama bin Laden start supporting this war?

13          A.    About 1997.

14          Q.    And when I say "support," how did he support?

15          A.    By recruiting Egyptians, Algerians, Yemenis, Uzbek's  
16 leaders, et cetera, all to come and fight on behalf of the indigenous  
17 government, that is, the Taliban.

18          Q.    Had he done that before?

19          A.    Well we know that he'd shipped weapons and fighters off to  
20 help the beleaguered Bosnians who were fighting against the Serbian  
21 ethnic cleansing in 1995, and he also helped and equipped fighters to  
22 go help the Chechen highlanders who were fighting against Russian  
23 federal troops from 1984 to 1996.

1           Q.    Now let's be clear.  When Usama bin Laden sent people to  
2   this--into the Taliban forces et cetera--would they be Usama bin  
3   Laden forces or would they be integrated into what you call the 055  
4   Ansars?

5           A.    Well they were part of the 055 brigade which was a  
6   preexisting command structure in the Taliban army.  So they weren't  
7   Usama bin Laden's army, no.

8           Q.    And beyond people, did he provide other material support?

9           A.    Yes, he did.  He provided weapons, he provided funding, he  
10   provide propaganda, so he was very interested in the success of this  
11   project of his, that is, the Ansar fighting force.

12          Q.    Earlier today in testimony they mentioned that Mr. Hamdan  
13   had told agents about a jihad against the northern alliance or a  
14   fatwa--excuse me, a fatwa that he had issued.  Have you seen that?

15          A.    I haven't seen that, but I have heard his quotes in which  
16   he is declaring war on the northern alliance.

17          Q.    So, in addition to the United States, he declared war on  
18   the northern alliance?

19          A.    That's correct.

20          Q.    And in that capacity, fought with the Taliban?

21          A.    Yes.  Correct.

22          MJ:  Mr. Swift, can I interrupt you for a minute.  We've been on  
23   the record for 45 minutes.  I'm thinking of the interpreter's

1 situation. Are you about to finish your examination, or do you need  
2 to take a break and return to this?

3 CDC [MR. Swift]: We'd like to take a break, sir.

4 MJ: Okay. Is this a good time?

5 CDC [MR. Swift]: Yes, sir. This is as good a time as any.

6 MJ: I'm sorry to interrupt you, but why don't we take a recess  
7 and give the interpreter time to rest and we'll return. I was going  
8 to suggest 15 or 20 minutes.

9 CDC [MR. Swift]: And we'll then go until 10 o'clock or so, Your  
10 Honor?

11 MJ: That's about the latest I think we can be productive and  
12 coherent in court. We'll take a recess and see how long it takes to  
13 finish your examination. Okay?

14 CDC [MR. Swift]: Okay, Your Honor.

15 MJ: Court's in recess.

16 **[The R.M.C. 803 session recessed at 2017, 6 December 2007.]**

17 **[The R.M.C. 803 session was called to order at 2042, 6 December**  
18 **2007.]**

19 MJ: Court is called to order. Please continue, Mr. Swift.

20 **[END OF PAGE]**

1 Direct examination by the civilian defense counsel, Mr. Swift,  
2 continued:

3 Q. Doctor, I'd like to talk about the training camps. These  
4 have been--and we'll discuss the slides and I might need a break to  
5 call a particular picture I want, Your Honor.

6 MJ: As you wish.

7 CDC [Mr. Swift]: I'd like to talk about the training camps.  
8 The training camps as they're generally referred to in Afghanistan.  
9 Can you tell me briefly their history?

10 A. Yes. Afghanistan's training camps were first built in the  
11 1980's under the auspices of the CIA and the Pakistani ISI, that is,  
12 the Pakistani Intelligence. These were camps built primarily in the  
13 tribal areas of eastern Afghanistan for training and equipping  
14 mujahedin freedom fighters to fight against the Soviets. This  
15 included a massive camp such as al Zawaheri which was later taken  
16 over by Usama bin Laden.

17 Q. What did they teach in these training camps?

18 A. Well, over time they went from teaching the mujahedin  
19 insurgent tactics to training people for all sorts of things. For  
20 example, there was a camp called al Badhr, where they taught trainees  
21 how to drive tanks--old Soviet era tanks. They had camps for  
22 infantry training. Camps for Special Forces style warfare based upon  
23 U.S. manuals. They had camps for a variety of ethnic groups

1 including Uzbeks from Uzbekistan, a lot of camps for fighters coming  
2 over from Pakistan training for jihad in Kashmir. So they had a  
3 variety of purposes, a variety of training topics, and a variety of  
4 tactics that were taught at these camps.

5 Q. Now there's been testimony that Mr. Hamdan reportedly went  
6 to the al Farouq training camp. Are you familiar with that training  
7 camp?

8 Q. Yes, I am familiar with that training camp.

9 A. What did they train at the al Farouq?

10 Q. Once again, a variety of tactics. I know for example that  
11 they had courses on the use of light infantry style weapons like the  
12 AK-47, the PK machine gun, and the RPG-7. That's the rocket  
13 propelled grenade. Those are the ones that I'm familiar with, but  
14 there's a whole variety of various topics that were taught at the al  
15 Farouq.

16 Q. Who ran this camp?

17 A. Well, initially it was run by the Pakistani ISI. When the  
18 Pakistani ISI lost control of the camps is an area that is in  
19 dispute, but sometime in the mid-90s various other autonomous jihad  
20 groups came into Afghanistan. A lot of them were independent  
21 Algerians, Tunisians, some Egyptians, all operating this sort of  
22 consolation of camps including al Farouq. But by 1997 the Taliban  
23 had given Usama bin Laden a sort of symbolic control or premiership

1 over all of these various camps located primarily in eastern  
2 Afghanistan.

3 Q. Were all of these camps--is that were the Ansars were  
4 trained?

5 A. Yes they were.

6 Q. So was Usama bin Laden in control of the Ansars?

7 A. Not on a day-to-day basis. He had other things that he was  
8 planning, but he had a sort of symbolic authority over the Ansars.  
9 He was sort of a patron saint or their godfather, or their main  
10 supplier of weapons, et cetera.

11 Q. Now did he have any camps that he used exclusively for  
12 terrorist purposes?

13 A. I would rank Darunta as one that fits that category. That  
14 was--I've heard one intelligence officer call it "the heart of  
15 darkness." That's the one that I know of that was primarily for  
16 terrorism, but I'm sure some of them were dual-purpose camps.

17 Q. Was al Farouk a dual purpose camp?

18 A. I don't know if--I assume that there were terrorists  
19 trained there. I think two of the 9/11 hijackers passed through al  
20 Farouk. It was also used by a lot of Ansars. I know that a lot of  
21 the Ansars had their training in al Farouq and subsequently were  
22 diverted to battlefields within Afghanistan.



1           Q.    If one was receiving light arms training, say machine guns,  
2 PK, that sort of thing.  Would that be consistent with the terrorism  
3 training or the Ansars training?

4           A.    Well, I would say that a PK machine gun is probably more of  
5 an infantry front line weapon than a terrorist weapon.

6           Q.    Let's talk briefly about uniforms.  Now we've seen a photo  
7 of the Ansars standing in what looks like a parade formation.  Did  
8 they wear those--what did they wear on the battlefield?

9           A.    Well according to photographs and interrogations I've done  
10 of Taliban prisoners of war carried out in 2003, videos and also the  
11 corpses we found of these Arab fighters in Afghanistan, they for the  
12 most part wore camouflage style western fatigues.  They were also  
13 known to wear western style footwear.  Often U.S. sneakers or Army-  
14 style boots and as headdress they often wore either the black turban  
15 of the Taliban or alternatively the Arab style headscarf.

16          Q.    Were they shy about being photographed?

17          A.    Not the Army people, and I think they were proud of their  
18 military prowess.  They called themselves the new Saladins or the  
19 Lions of Islam.  They saw themselves as perhaps the very first Arab  
20 fighting force to win battles.  They lost against the Israelis,  
21 against Saddam--I mean against the Armenians, against everybody, so  
22 this is their first real chance to win.

1 Q. After 9/11 and the United States entered the conflict; did  
2 they continue to fight in uniform to the best of your knowledge?

3 A. Yes, in fact I have some video that I acquired from  
4 Northern Alliance troops in Northern Afghanistan which features a lot  
5 of images, a lot of gory images of blown-up fighters who had been hit  
6 by Daisy cutters and 500 pound bombs, et cetera, and couriers a lot  
7 of these were Arabs, foreign fighters, and they were wearing, once  
8 again the sneakers, western style pants and jackets fatigues, so they  
9 were fighting in these very peculiar western style outfits. And the  
10 only ones in Afghanistan, I would add who were distinguishable by  
11 wearing things like Gortex jackets, camouflage fighting uniforms and  
12 the distinctive Arab headscarf.

13 Q. Have you seen news reports from western sources and from  
14 Arab sources that were on the ground time at the time that indicated  
15 that they readily saw them in uniform?

16 A. Yes, I've seen BBC reports from Kabul, al Jazeera reports  
17 from Kabul and also a couple of articles in the Christian Science  
18 Monitor which mention the fact that these Arab fighters who were  
19 stationed in Kabul, in Kandahar, and in Kunduz, were all wearing  
20 camouflage uniforms.

21 [END OF PAGE]  
22  
23

1           Q.    I'd like to talk to you about--you've given a couple of  
2 stories about their tactics, how they were utilized but within the  
3 Taliban command structure can you talk about generally what kind of a  
4 force they were and when and where they were utilized?

5           A.    They were what we call today a sort of mechanized infantry.  
6 They were used when the fighting got tough.  Primarily when the  
7 Northern Alliance was dug in, firmly entrenched and there was a stale  
8 mate on the lines between the Taliban and the Northern Alliance,  
9 that's when you called in the Arabs.  They typically came in riding  
10 in Toyota Hilux pickup trucks often with antiaircraft guns welded in  
11 the back or 170 millimeter Oregon or other Multiple Rocket Launcher  
12 systems welded into the back of the trucks.  They would typically  
13 come in hard and fast and they weren't afraid of taking casualties.  
14 That's one thing both the Northern Alliance people both Tajik and  
15 Uzbek that I interviewed said was that these guys were by Afghan  
16 standards very committed to the battle and very, very disciplined and  
17 very willing to sustain losses to achieve their military objectives.

18          Q.    What did DoD say about them when the battles began in  
19 October?

20          A.    The DoD reported in I believe it was the October or  
21 November of 2001, that the Arab fighters were, I think they said were  
22 the most professional fighting force in all of Afghanistan or  
23 something along those lines.  That they were the most regimented and

1 formal and professional fighting force that they encountered.

2 Q. Did the Northern Alliance view the Arab fighters as  
3 unlawful combatants?

4 A. No, in fact the president of the Northern Alliance, a man  
5 by the name of Rabbani, made a pronouncement that when they captured  
6 the foreign fighters they were to be given treatment as prisoners of  
7 war. I personally interviewed a lot of these prisoners of war who  
8 were held in a giant sort of medieval prison fortress in the deserts  
9 of northern Afghanistan.

10 Q. Why did you call them, "prisoners of war"?

11 A. Well, that's what Dostum called them when I met with him in  
12 2003, and he allowed me to interview them.

13 Q. Were they just Taliban?

14 A. No, a lot of them were Ansars. The vast majority of the  
15 Ansars that I personally video taped and interviewed in this fortress  
16 prison were Pakistani Ansars.

17 Q. You know when that--when Rabbani promised that everyone--  
18 that the Arab fighters would receive Geneva Convention protections?

19 A. I don't know exact dates, but it was sometime in November  
20 of 2001, so right in the heart of Operation Enduring Freedom.

21 [END OF PAGE]

22

23

1       Q.   Now, we've talked about the Ansars participation with Usama  
2 bin Laden and his being their patron saint, et cetera, did that mean  
3 that everyone who fought in the 055 believed in Usama bin Laden's  
4 activities in--as it related to the embassies, the Cole bombing, and  
5 9/11?

6       A.   No, it does not. In fact there is a very interesting book  
7 that's come out in the last couple of years by a man by the name of  
8 Ferwez Gerges. He's a professor in America, Egyptian extract, and he  
9 has spent the last few years analyzing dissention and tension within  
10 the larger jihad movement and he had some wonderful quotes by members  
11 of the brigades saying we do not agree with terrorism, we reject the  
12 attacks on America, on 9/11, and we wanted to stay in Afghanistan.

13           We did not consider the U.S. to be our enemy. So these are  
14 members of what we would call in the largest sense of the word al  
15 Qaeda in Afghanistan saying we reject terrorism because we are the  
16 Lions of Islam. We believe in frontal warfare, mano-a-mano. We do  
17 not agree with bin Laden's attacks on September 11th.

18       Q.   Why did they fight then?

19       A.   Well, for several objectives. I think that they wanted to  
20 create an alternative Islamic state in Afghanistan. I think that  
21 they saw the Northern Alliance as being a major threat or hindrance  
22 to their efforts to create this dream of Islamic utopia where all

1 Arab or Islamic dissidents could come and live under Sharia Islamic  
2 law.

3 Q. Why do they fight after 9/11?

4 A. Well, that is more clear. When you have a Muslim country  
5 it is considered in Islamic theological terms, "Dar al Islam". That  
6 means the realm of Islam, its holy soil, where Islamic law is being  
7 practiced. Whenever "kafirs" or infidels invade Islamic soil whether  
8 it be Serbs in Bosnia, Russians in Chechnya, Indians in Kashmir, or  
9 Americans in Iraq, it is a duty of a good practicing Muslim to defend  
10 that soil. So, they saw themselves under threat just as the  
11 mujahedin had in the 1980's when the Soviets invaded.

12 Q. So they weren't fighting for Usama bin Laden?

13 A. Not necessarily. In fact some of them explicitly, once  
14 again, had rejected terrorism but were fighting to defend holy  
15 Islamic soil.

16 Q. I'd like to turn and talk about Usama bin Laden's other  
17 project. Did it have a name?

18 A. Well, the--those who were in the know, that is those who  
19 were exclusive, called it, "al Qaeda al Sulbah." That means in  
20 English, "the solid base." This was what I call a cellular structure  
21 made up of Akunds. An Akund is a very isolated cell structure like  
22 for example, the 9/11 Hamburg sleeper cell team. These were people  
23 who were committed to one very important concept, "Shaheed, ista

1 Shaheed," which means committing suicide or martyrdom operations as  
2 they refer to them. They committed a "bayat," an oath to die, a very  
3 terminal sort of relationship, to die for the cause of removing  
4 Americans from Saudi Arabia, the Jews from Israel, this was a  
5 terrorist organization with a strong focus on martyrdom operations,  
6 i.e., suicide attacks, like 9/11.

7 Q. Did it operate inside Afghanistan?

8 A. Well, that's the absolute irony of Operation Enduring  
9 Freedom. Had we invaded Afghanistan a few months before them, the  
10 9/11 team would have still been in places like New Jersey or Madrid  
11 or London or Bali or Istanbul or Morocco or Tunisia. All these  
12 places where we've had al Qaeda sleeper cells attack since 9/11, al  
13 Qaeda doesn't need an actual territorial base--that is al Qaeda al  
14 Sulbah, the terrorist group--it wasn't focused primarily in  
15 Afghanistan. As I said before, it was cellular; it was sleeper  
16 cells, and it was located in towns like Hamburg, Germany, where  
17 Muhammad Atta is from.

18 Q. Was the leadership located in Afghanistan?

19 A. They were. The very top trokia that is Usama bin Laden,  
20 Muhammand Atta, certainly the military commander, and Zawaheri.

21 [END OF PAGE]

1 Q. Can you give me some of the characteristics of people who  
2 be chosen to be in al Qaeda al Sulbah?

3 A. Yes, I can. A very distinguished ex-CIA colleague of mine  
4 named Mark Sageman, has written a book entitled, Understanding  
5 Terrorist Networks and what he's done is spend the last few years  
6 profiling every known member of al Qaeda al Sulbah. That is the bona  
7 fide terrorist cell organization. And he has found something  
8 remarkable that these al Qaeda al Sulbah members are almost always  
9 coming from wealthy families, educated, most of them have college  
10 degrees, most of them come from very tight knit families with high  
11 connections in their home countries and most importantly they are  
12 what he calls "white collar" terrorists.

13 They offer something to al Qaeda, for example, French  
14 citizenship. They can speak English. They are Masters Degrees in  
15 Germany, like Muhammand Atta. In other words, they have the  
16 potential to carry out major operations in the territories of a far  
17 enemy that is the west.

18 Q. Now, in conjunction with them they were said to swear a  
19 bayat?

20 A. Correct.

21 [END OF PAGE]



1           Q.    In Mr. Hamdan's trial it's been testified that he swore a  
2   partial bayat.  Have you ever heard of a partial bayat in this  
3   conjunction with al Qaeda al Sulbah?

4           A.    No, if you swear bayat to commit martyrdom or suicide you  
5   can't have part suicide.  It's all or nothing and this group as I  
6   said before took their suicide operations very seriously as testimony  
7   of the events of 9/11.

8           Q.    Do you know of any al Qaeda al Sulbah operations that  
9   occurred in Afghanistan at all?

10          A.    Yes, I do.

11          Q.    Can you tell me about one that did?

12          A.    The one that is of course most famous is the killing of  
13   Massoud, the "Lion of Panjsher."  This was the legendary Mujihadeen  
14   commander who fought against the Soviets in the 1980s, he even  
15   starred in Rambo III, and he also led the Northern Alliance  
16   opposition.  He was killed by an al Qaeda suicide team on 9/9/2001  
17   and this was, of course, launched by bin Laden.

18          Q.    Tell me, was that operation--where did it start from?

19          A.    It started in Belgium.  These were Moroccans and also  
20   Tunisian Arab's living in Belgium, married to local Belgium women,  
21   who trained for this operation.  Made their way to Afghanistan,  
22   infiltrated Massoud's territory and killed him.

1 Q. Was it--other than that operation, do you know of any other  
2 al Qaeda al Sulbah operations in Afghanistan in relationship to the  
3 civil war?

4 A. That's the only one I know of; of a major al Qaeda al  
5 Sulbah operation within Afghanistan

6 Q. I'm going to use an analogy and correct me if you disagree.  
7 During World War II, the SS is extraordinarily famous or among its  
8 thing it has a history for running the death camps. Unquestionably  
9 an illegitimate operation, a horrific operation, but the SS also  
10 fought as combat units. They were headed by one man who was a war  
11 criminal, ostensibly, but not actually, was also commanding people  
12 who fought in regular battles. Is that at all accurate to the  
13 situation we have here with al Qaeda al Sulbah and the Ansars where  
14 they then get all grouped into a question of al Qaeda?

15 A. Yes, I think that analogy is apt for the situation.

16 Q. I'd like to go now to draw your attention to the battle of  
17 Takteh-Pol and I'd like to bring up if I could the map.

18 **[The court reporter published the document as directed.]**

19 **Questions by the civilian defense counsel, Mr. Swift, continued:**

20 Q. Can you show me on this map, and I'd like this to be  
21 admitted as a Defense Exhibit----

22 PROS: No objection, Your Honor.

23 MJ: A defense exhibit?

1 CDC [Mr. Swift]: Excuse me, as a--the next appellate exhibit.

2 MJ: Okay.

3 PROS: Still no objection, Your Honor.

4 CDC [Mr. Swift]: If we could put the map up on the board,  
5 please?

6 **[The court reporter published the document as directed.]**

7 **Questions by the civilian defense counsel, Mr. Swift, continued:**

8 Q. Now, it's late and we're tired, but let's see if we can use  
9 the markers in such a way that they work. If you could --on 9/11 or  
10 thereabouts for the period right at that time, can you show me when  
11 it was controlled by the Northern Alliance, what portion of  
12 Afghanistan was controlled by the Northern Alliance and what portion  
13 of Afghanistan was controlled by the Taliban.

14 **[The witness circled the area with the marker as directed.]**

15 A. Just in the north here. This whole enclave up here was  
16 Northern Alliance, this area right here and also another pocket here,  
17 so, these areas are the Northern Alliance.

18 Q. Now, when the United States entered did--was there  
19 significant conflict--combat between 9/11 and the United States  
20 entry, insertion of troops in October of 2001?

21 A. No, there was--there was something of a stalemate. There  
22 was a sense of shock in Afghanistan and two lines were stalemated as

1 everyone waited to see what the American superpower was going to do  
2 to this travesty.

3 Q. When the United States entered can you with blue show where  
4 they entered?

5 A. They entered in this pocket here and also in this pocket  
6 over here initially. This was October 19, 2001.

7 Q. What started to happen--when was the first major battle  
8 after that?

9 A. The first major battle involved General Dostum moving and  
10 taking Mazar-e Sharif in the north. This was the key to the north.

11 Q. Who did he fight there?

12 A. He fought a combination of Taliban with a large sort of  
13 vanguard of foreign fighters in their midst.

14 Q. What happened?

15 A. They crushed them with a horse-mounted cavalry, a  
16 combination of close air support, and of course these Daisy cutter  
17 mega bombs that I referred to earlier.

18 Q. Now, was that--how many of the--what was the 055 strength  
19 after that battle?

20 A. Well, before the battle it was guestimated to be somewhere  
21 around 2000 to 3000 in this area. They took a hammering and we can  
22 estimate that over a thousand of them died in that squared area up  
23 there **[witness pointing to map]** and also going over toward Kunduz.

1           Q.    After losing the battle what did they do?

2           A.    Well, they held out and they fought to the death in a  
3   school in the center of Mazar-e Sharif.  And another group of them  
4   held out and fought almost to the death in Kunduz, but they were  
5   captured and taken to a castle called Qala i Jengi and there the  
6   launched an uprising and were slaughtered by American bombs.  This is  
7   how we found Johnny Walker Lind, the American Taliban.

8           Q.    With regards to that and your time with General Dostum, and  
9   I do want to point out, it was pointed out, these humanitarian rights  
10  groups have accused General Dostum, and sometimes the American forces  
11  for standing around while prisoners were mass executed, et cetera,  
12  that he engaged in his own version of ethnic cleansing or mass  
13  executions of these prisoners.  Did you--when you were with him did  
14  you see anything to back that up?

15          A.    No, in fact I went to the supposed grave site where these  
16  mass prisoners were supposed to have been buried and it was an area  
17  smaller than this room.  The locals said that less than 200 people  
18  were buried there and in fact General Dostum turned over almost all  
19  the prisoners that he took to the Red Cross and to the Karzi  
20  government and to the Pakistani government.  So, there's been no  
21  verification of any massacre and in fact I'm the only one to go over  
22  there and independently interview the Taliban prisoners who would  
23  supposedly know about and even the Taliban prisoners who were in that

1 fortress prison rejected the notions that thousands of them had been  
2 sort of been massacred in some hidden tragedy.

3 MJ: Mr. Swift, excuse me for interrupting. Can you tell me  
4 where we're going with this and why it's relevant to the issues  
5 before the court?

6 CDC [Mr. Swift]: Just in the conduct of the war and that both  
7 sides were playing by the Geneva Conventions, Your Honor. I don't--I  
8 want to put out that the battle--the idea--there's been an idea or  
9 promulgated relevant with are other courses either side conducting by  
10 the Geneva Conventions. My point on the balance of it is that both  
11 sides were playing by the Geneva Conventions here.

12 MJ: Okay, I'm ready for you to move forward.

13 CDC [Mr. Swift]: Okay.

14 MJ: I think we're a little far field if we're in Northern  
15 Afghanistan.

16 **Questions by the civilian defense counsel, Mr. Swift, continued:**

17 Q. Now, moving toward the operations to take Kandahar, can you  
18 give--and the battle of Takteh-Pol, have you read about the battle of  
19 Takteh-Pol?

20 A. Yes, I have.

21 MJ: Why don't you go ahead and sit down again, thank you.

22 **[The witness did as directed and resumed his seat in the witness**  
23 **chair.]**

1   **Questions by the civilian defense counsel, Mr. Swift, continued:**

2           Q.    Can you tell me about how that occurred; what was happening  
3   and who was there?

4           A.    Essentially you had two what they called Southern Alliance  
5   Commanders, these weren't Northern Alliance, you had Gul aga Sherzai,  
6   and you had Hamid Karzai.  And they were both racing towards Kandahar  
7   crushing one of the last holdouts of the actual Taliban in the south.  
8   They destroyed them using close air support, Special Forces, and of  
9   course indigenous allies.  And they crushed both the Taliban elements  
10   and the foreign Ansars elements in between Kandahar and the Pakistani  
11   border.

12          Q.    Now, how had the Ansars gotten there?

13          A.    Well they been stationed there and they were told the  
14   defend Kandahar against the foreign forces and the coalition troops.

15          Q.    So they were integrated into the Taliban forces?

16          A.    Yes.  They'd been given several key sort of positions to  
17   hold.  They had also been given control of antiaircraft batteries so  
18   they were playing by this stage a very major role in the defense of  
19   the Taliban spiritual capital, Kandahar.

20          Q.    There was testimony in the part that Route 4 was the major  
21   supply route to Kandahar for which these groups would be re-supplied  
22   coming up to at the time; are you familiar with Route 4?

23          A.    Yes, I am.

1 Q. Would you agree that Route 4 was a major supply route into  
2 Kandahar?

3 A. Yes.

4 Q. And the testimony of Major [REDACTED] earlier today was he with  
5 indigenous forces moved quickly to cut off Route 4 to set up a  
6 checkpoint and to stop the endless flow of supplies. Does that  
7 comport with your understanding of what was going on at that point in  
8 time?

9 A. Yes, absolutely, absolutely.

10 Q. Was Kandahar being supplied by Route 4?

11 A. Yes, it was. We know that elements within Pakistan were  
12 still sending small arms ammunition and other supplies up Route [sic]  
13 4 to bolster the Taliban in this very symbolic defense of their  
14 spiritual capital.

15 Q. Would have SA-7's been used in that offense?

16 A. Yes.

17 Q. Now, that defense, it was being conducted by the Taliban  
18 and Ansars. All the things that I've said or that you've talked  
19 about today about how that fighting unit was organized, how they  
20 fought, et cetera, would that have been true for the battle of  
21 Kandahar that they were by and large in uniform?

22 A. Yes, we've actually some photographs of them in uniform and  
23 once again they're the ones that fought to the death in Kandahar and



1 the Taliban sort of melted into the countryside.

2 Q. Did they conduct their operations there conventionally?

3 A. Absolutely, I mean they fought with all these batteries and  
4 multiple rocket launcher systems, AK-47's, et cetera.

5 Q. Now, the testimony is that Mr. Hamdan was captured on  
6 November 24th and we suggested with SA-7's in his possession moving  
7 toward Kandahar on the 24th. What would that be consistent with?

8 A. This fits the pattern of Arabs, especially at this late  
9 stage of the game, assuming more and more of the key strategic  
10 defenses. The Taliban weren't as inclined to stand and fight at this  
11 stage. They received a pounding in the north and increasingly the  
12 Arabs were given more and more responsibility in various strategic  
13 spots around Kandahar and also areas further up towards Kabul.

14 Q. Now where was Usama bin Laden while all this was going on?

15 A. Well, he had made his way from Kabul to a town called  
16 Jalalabad in Eastern Afghanistan and from there he eventually had  
17 gone over what are called the Tora Bora mountains just south of  
18 Jalalabad and crossed into a sort of peninsula of Pakistani territory  
19 going into Afghanistan and disappeared into a province called  
20 Waziristan.

21 [END OF PAGE]

22

23

1           Q.    Were there reports that al Qaeda al Sulbah, these foreign  
2 fighters, were--or the al Qaeda solid base were now among the Arab  
3 fighters of--fighting to the death?

4           A.    No, from what I understand the elite, that is the bona fide  
5 al Qaeda al Sulbah, such masterminds as Kalid Sheikh Mohammed, Ramzi  
6 Bin al-Shibh, Usama bin Laden, Ayman al-Zawaheri, the big fish in  
7 essence, had all evacuated en masse over the Tora Bora mountains and  
8 had disappeared into the tribal zone of Waziristan.

9           Q.    So there's no evidence they ever fought at all?

10          A.    They seem to have abandoned their fighters to the war and  
11 scurried to Pakistan.

12          Q.    When you said they--you gave this where they go from  
13 Jalalabad on over to the mountains--what was that time period if you  
14 could?

15          A.    This is taking place--well, it began in Jalalabad in late  
16 November and crossed over in waves in December 2001.

17          Q.    There's also been testimony that Mr. bin Laden would at  
18 times send his bodyguards to be fighters, rotate them; were you aware  
19 of that

20          A.    I was aware of some sort of relationship between his  
21 bodyguards and the Army. Some circulation or percolation of troops,  
22 et cetera, I have no specifics though.

1           Q.    Are you aware of him ever using the al Qaeda al Sulbah  
2 other than that terrorist operation to supplement the Taliban foreign  
3 fighters?

4           A.    No----

5           Q.    Or as part of this?

6           A.    Yeah, in fact the al Qaeda al Sulbah were too precious.  
7 These were bright people. Like the 9/11 Hamburg team, they were not  
8 going to be squandered storming the trenches in a place like Kunduz,  
9 Afghanistan. They were too highly valued. They were the Harvard of  
10 the organization whereas the guys in the trenches were often cannon  
11 fodder. They were more dispensable.

12          Q.    To just break for a moment, if I say the name Khattab,  
13 what relevance would that have to all of this?

14          A.    He's someone most Americans don't, but if you live in the  
15 Middle East, especially if you're a young man, everybody knows  
16 Kattab. He's a hero to even moderate Muslims who like Americans.  
17 Who is he? He is a Saudi jihad warrior, "a Lion," they call him in  
18 the Middle East, who fought against the Soviets in Afghanistan in the  
19 1980s.

20                He fought against the communist government in Tajikistan in  
21 the 1990s and eventually he made his way over to defend the out-  
22 gunned Chechnya Highlanders against the Russian federal forces in  
23 1995. And he was a very effective commander who was one of the

1 leaders who actually helped a mere 10,000 Chechnyans outfight a  
2 larger Russian Army of 60,000, so he was very media savvy and he was  
3 somebody who had a clash with bin Laden.

4           The clash with bin Laden was over terrorism. Emir, or  
5 Commander Khattab, was adamant that warriors, that is jihad warriors,  
6 should follow the oath, the code of Abdullah Azzam, the original  
7 founder of the international jihad movement. He adamantly rejected  
8 terrorism. He fought with a small army called the International  
9 Islamic Brigade in Chechnya and in some ways he personifies the  
10 frontal fighting spirit of the Ansars that fought in Afghanistan.

11       Q.    If someone were to suggest Mr. Hamdan had originally come  
12 to fight or--under Khattab, that his trip to Tajikistan et cetera,  
13 was for that purpose; would that be consistent with him being an  
14 Ansars or believing in the Ansars code and ability are being part of  
15 the al Qaeda al Sulbah base.

16       A.    In light of Khattab's role as a heroic frontline fighter,  
17 whose career I've followed very closely since the late 1990s. It  
18 seems that if he's one of these young men who aspire to be a new  
19 Saladin, to fight under a heroic commander Emir Kattab.

20       Q.    I have one more thing and I'll be done. I'd like to show a  
21 brief section of a video to you. I've previously showed you a video  
22 that was provided to us by the prosecution but it's been on CNN many  
23 times.

1           PROS: No objection.

2           CDC [Mr. Swift]: If I might go ahead and publish this portion  
3 of the video.

4           MJ: Very well.

5   **[The court reporter published the video as directed.]**

6           MJ: Is there something special you want me to see in this,  
7 counsel?

8           CDC [Mr. Swift]: In a moment we'll have it frozen, sir.

9   **Questions by the civilian defense counsel, Mr. Swift, continued:**

10          Q. As it moves through, do you recognize the individual behind  
11 Mr. bin Laden?

12          A. Yes, that's Salim Hamdan.

13          Q. Let's talk about the outfit he's wearing. What's that the  
14 outfit of?

15          A. Well, he's wearing western style Khakis or military  
16 fatigues. This is emblematic of the uniforms I've seen on the  
17 battlefields across Afghanistan that were used by the 055 Ansars in  
18 combat operations against the Northern Alliance.

19          Q. Would it be inconceivable for you to have someone who was  
20 in bin Laden's personal company also then go fight for the Ansars?

21          A. No, not in the least.

22          CDC [Mr. Swift]: Your Honor, I have no further questions.

1 MJ: Very good. I think it's time to take a recess. And does  
2 government have any cross-examination?

3 APROS: We will, sir, yes. How long of a break do you want to  
4 take, sir?

5 MJ: Well, why don't we see if 15 minutes is enough? We're  
6 trying to be considerate of the interpreter's time.

7 CDC [Mr. Swift]: I believe its 9:30 and if we are able to get a  
8 witness tomorrow it will be short and that's speculative at best. We  
9 can't possibly finish, I would suggest we break for the evening.

10 MJ: How long will your examination be?

11 APROS: Well----

12 MJ: I would prefer, I guess----

13 APROS: ----well, you can always use more time. We didn't get a  
14 lot of notice on the witness, sir. We can meet tomorrow at 0900. I  
15 think all we have is the cross-examination then argument.

16 MJ: How long will your examination of this witness be?

17 APROS: Maybe 20 minutes, maybe 25 minutes.

18 MJ: I'd like to take a recess and come back and do that  
19 tonight. Why can't we call the witness, your witness, tonight on the  
20 telephone?

21 CDC [Mr. Swift]: Because its 4 A.M. in Yemen right now sir.

22 MJ: Well, there are a lot of logistical difficulties associated  
23 with re-convening in the morning. There's all the people that have

1 to lock down the building, provide security, transport people back  
2 and forth, there's the ferry, there's all the luggage that has to be  
3 moved.

4 I would prefer to call him at 4 A.M., I guess, and wake him  
5 up and take his testimony tonight, especially if the government's  
6 cross-examination is going to be brief. I know that's inconvenient,  
7 but I did mention last night that you could call this witness and  
8 hopefully you contacted him and alerted him that you're going to do  
9 that, so he should be sleeping soundly--or lightly, I mean. We'll  
10 recess for 15 minutes.

11 Court's in recess.

12 **[The R.M.C. 803 session recessed at 2132, 6 December 2007.]**

13 **[The R.M.C. 803 session was called to order at 2151, 6 December**  
14 **2007.]**

15 MJ: The court is called to order. Trial Counsel?

16 APROS: Yes, sir.

17 MJ: I think a very succinct cross-examination would be  
18 appropriate here.

19 APROS: Thank you, sir.

20 **CROSS-EXAMINATION**

21 **Questions by the assistant prosecutor:**

22 Q. Good evening, Mr. Williams.

23 A. Good evening.

1           Q.    First, is it your position that all members of al Qaeda in  
2 Afghanistan are lawful combatants?

3           A.    No.  In fact, I think some names I mentioned in the last  
4 hour certainly were not.  The ones that come to mind are Khalid  
5 Sheikh Muhammad, et cetera.

6           Q.    Is it your testimony that al Qaeda conducts operations in  
7 uniform?

8           A.    Yes.  That is, the fighting component, not the terrorist  
9 component.

10          Q.    All of them?  You mean always?

11          A.    The Ansars?

12          Q.    Correct.

13          A.    I would say the uniform is varied from camouflage to a  
14 little more or less formal.

15          Q.    You talked about a bayat meaning "suicide;" right-- means a  
16 loyalty or a pledge to suicide; correct?

17          A.    Actually, technically speaking a bayat just means "an  
18 oath," but if you join al Qaeda al Sulbah you then swore a bayat  
19 which involved the word shaheed which means "suicide."

20          Q.    So you would agree with me that there is an organization  
21 called al Qaeda?

22          A.    Yes, I would.

23



1           Q.    And you would agree with me that the emir of that  
2 organization is Usama bin Laden?

3           A.    Yes, I would.

4           Q.    He has been at the centerpiece since its founding; correct?

5           A.    Correct.

6           Q.    Founded in 1989?

7           A.    Correct.

8           Q.    And they actually have a charter?

9           A.    Yes.

10          Q.    Their goal is to fight Zionist crusaders and to expel the  
11 infidels from the Arabian Peninsula; correct?

12          A.    Correct.

13          Q.    And they also want to reestablish the Caliphate in areas of  
14 what they consider Muslim lands?

15          A.    That's a later addition to the project, though.

16          Q.    To reunite the people under umma Sharia law? Would you  
17 agree with that?

18          A.    Correct. Yes.

19          Q.    That is their purpose?

20          MJ:   Excuse me, Professor, would you like a cup of water? You  
21 have been testifying quite awhile.

22

1           WIT: No. I'm fine, thanks. I can drink at the break, thank  
2 you.

3 **Questions by the assistant prosecutor continued:**

4           Q. That is al Qaeda's purpose; correct?

5           A. It is also to create a base of the named states, to  
6 overthrow Munafiqs. Munafiqs are apostate rulers; such as the King  
7 of Jordan and the rulers of Saudi Arabia.

8           Q. For the purpose though of creating a Sharia law system  
9 within the umma; correct?

10          A. Correct.

11          Q. There really isn't any other purpose for existence of al  
12 Qaeda as started by Usama bin Laden?

13          A. Yes.

14          Q. And now if a person is performing a role for Usama bin  
15 Laden, he would be supporting that role; would he not?

16          A. If you swore the bayat to join al Qaeda al Sulbah, yes.

17          Q. If he is just performing--for instance if he is protecting  
18 the leader, he would be materially supporting him. Would you not  
19 agree with that?

20          A. Yes, I would.

21

22

1           Q.    If he was harboring his escape from U.S. attack, you pretty  
2 much don't get more materially supporting than that, do you?

3           A.    Correct, if you are harboring his escape.

4           Q.    If it's done during the participation of hostilities, you  
5 would call him a combatant; wouldn't you?

6           A.    With the one exception that I mentioned earlier which is  
7 that members of the Ansar who did, from what I understand fight in---  
8 -

9           Q.    I am just talking if he is harboring him, if he is  
10 harboring him.

11          A.    Yes, absolutely to harboring.

12          Q.    He is taking him from Kandahar, their home, to Kabul to  
13 avoid detection; would you agree me?

14          A.    Yes, that harboring or transportation----

15          MJ:   I'm sorry. Just a moment. You are going too fast,  
16 Commander Stone.

17          APROS: I'm sorry.

18          MJ:   Commander, actually I think you are asking the witness to  
19 make legal conclusions that I am going to make. I am not sure that  
20 he is in a position to testify authoritatively on whether or not a  
21 certain action makes someone a combatant.

22          APROS: Yes, sir.

23          MJ:   Thank you.

1   **Questions by the assistant prosecutor continued:**

2           Q.   Al Qaeda was--had a shura counsel; correct?

3           A.   That's correct.

4           Q.   And Usama Bin Laden was the emir?

5           A.   Correct.

6           Q.   Abu Hafs al Masri, was he a military commander?

7           A.   Yes.

8           Q.   Also known as Muhammed Atef?

9           A.   Correct.

10          Q.   Seif Hlabel, the head of security?

11          A.   Correct.

12          Q.   This group of people from your testimony formed the primary  
13 leadership of this al Qaeda al Sulbah organization; correct?

14          A.   Correct.

15          Q.   And Iman al Zawaheri was the head of--used to be the head  
16 of the Egyptian Islamic jihad?

17          A.   Correct.

18          Q.   Now he is the number two person in al Qaeda?

19          A.   Yes.

20          Q.   And they are still at large?

21          A.   Correct.

1       Q.   Now, al Qaeda's role in the world began in '89, but their  
2 first terrorist attacks began in approximately 1992. Do you agree  
3 with that?

4       A.   There is a lot of skepticism about that and also about the  
5 '93 bombing. These were people that were not necessarily part of al  
6 Qaeda.

7       Q.   I didn't mention anything about the '93 bombing.

8       A.   Yes, '92 the same. There is serious doubts in the  
9 intelligence community that this was actually done by what we call  
10 today al Qaeda.

11      Q.   I didn't mention the bombing.

12      A.   Well, you mentioned terrorists attacks, so I assumed----

13      Q.   The Aden attack on hotels in 1992?

14      A.   Right.

15      Q.   The 9/11 report says that was actually an al Qaeda attack;  
16 correct?

17      A.   This is once again disputed in the intelligence community.

18      Q.   Disputed, okay. Now in Somalia al Qaeda took  
19 responsibility for attacking U.S. forces in Somalia; isn't that true?

20      A.   They took credit for it, but it was one shot with an RPG.

21      Q.   They took credit for; correct?

22      A.   For someone else's work, I would argue.

23

1 Q. For training someone?

2 A. Once again I doubt it.

3 Q. You talked about the 55th brigade. Isn't it true that this

4 55th Brigade was loyal to Usama bin Laden?

5 A. Not all members, no.

6 Q. Now, you had an article where you that the 55th Brigade was

7 "his" brigade referring to Usama bin Laden; correct?

8 A. Correct.

9 Q. And your conclusion is that when "his" brigade was

10 destroyed he lost the ability to pursue the haste in Afghanistan;

11 correct?

12 A. Absolutely.

13 Q. And your article also goes on to say that as a goal that

14 the--actually you describe al Qaeda as a parasite controlling its

15 host; correct?

16 A. Correct.

17 Q. And the way that it controlled its host was through this

18 55th Brigade?

19 A. And finances, more importantly.

20 Q. And that al Qaeda was financing the Taliban?

21 A. Correct.

22 Q. And this organization as well?

23 A. Correct.

1           Q.    I am not going to ask that the pictures be put up, but if  
2 we can all remember as we go through them. Would you agree with me  
3 that media is important to al Qaeda?

4           A.    Very.

5           Q.    Basically it relies on the media to spread its message?

6           A.    Absolutely.

7           Q.    They spread their message both to the United States and to  
8 the rest of the Muslim world?

9           A.    Correct.

10          Q.    And the propaganda that they spread is used to recruit?

11          A.    Yes.

12          Q.    In fact, when they do this propaganda, they need to put--we  
13 would call it in the military "projecting power." Would you agree  
14 with that assessment?

15          A.    Yes, I would.

16          Q.    It is important for them to look like an organized group;  
17 would you not agree with me?

18          A.    Yes, I would.

19          Q.    The picture of the group marching under the what you refer  
20 to as the Ansar flag?

21          A.    Yes.

22

23

1           Q.    And I am sure you remember which picture it is, sir. Isn't  
2 true that that picture was a staged picture that was put into the al  
3 Qaeda recruiting video of the destruction of United States destroyer  
4 Cole?

5           A.    Yes. I've seen it in four other venues as well.

6           Q.    Al Qaeda has its own production company; does it not?

7           A.    It is called al Sahab.

8           Q.    Al Sahab?

9           A.    Yes.

10          Q.    It means "the clouds"?

11          A.    Correct.

12          Q.    Now that picture that you show of Abu Faraj al Libi, that's  
13 actually a media production of al Sahab; is it not?

14          A.    That's right, yes.

15          Q.    And you know that because of the al Qaeda al Sulbah logo  
16 that you see in the bottom left?

17          A.    Actually that is an al Jazeera logo you see in the bottom  
18 left.

19          Q.    It's certainly mentioned other--made other knowledge--other  
20 videos that have been spread throughout the Muslim world and the  
21 United States.

22          A.    Mainly.



1 Q. Now that picture--the video that we showed, that the  
2 defense put on and had you identify Salim Hamdan. Isn't that also  
3 from a press conference that was held for Pakistani journalists in  
4 1998 as a press conference to announce the creation of the world  
5 Islamic front for jihad.

6 A. Yes, it was.

7 MJ: I'm sorry that was the video clip that was shown by  
8 defense?

9 APROS: The video clip, yes, sir.

10 **Questions by the assistant prosecutor continued:**

11 Q. And would you also agree with me that it was a press  
12 conference?

13 A. Yes, it was.

14 Q. That was an extremely important press conference in the  
15 life of what we call al Qaeda.

16 A. That was the unity between Egypt and al Qaeda, yes.

17 Q. In fact, when you talked earlier you said that the unity of  
18 al Qaeda and EIJ is what made al Qaeda truly an operational  
19 organization, correct?

20 A. That is correct.

21 **[END OF PAGE]**

1           Q.    Now when al Qaeda--or Usama Bin Laden moved into  
2 Afghanistan in 1996, you had testified the 55th Brigade did not exist  
3 yes. Is that true?

4           A.    Well it did as an old Afghan fighting unit, but it was re-  
5 resurrected under the al Qaeda in '97.

6           Q.    So Usama bin Laden actually--but he used the same  
7 nomenclature--Usama Bin Laden essentially took over whatever became  
8 known as the 55th Brigade?

9           A.    Correct, yes.

10          Q.    And the purpose of that was to defend Usama Bin Laden's  
11 sanctuary?

12          A.    Actually it was meant more to help him ingratiate himself  
13 with the Taliban by giving them a bona fide fighting force to fight  
14 against their enemies, the Northern Alliance.

15          Q.    Would you not agree with me that if the Taliban lost, Usama  
16 Bin Laden's search for Caliphate in Afghanistan would have failed?

17          A.    Correct.

18          Q.    So, by supporting and providing information, money,  
19 resources, soldiers to the Taliban; Usama bin Laden was protecting  
20 himself?

21          A.    Correct.

22

23

1 Q. And that those individuals were actually -- a good many of  
2 them were loyal to Usama bin Laden?

3 A. Yes.

4 Q. And would you agree with me that the method of Usama bin  
5 Laden in carrying out of his acts against the United States is terror  
6 tactics?

7 A. By definition, absolute yes.

8 Q. In fact, you've actually called all of al Qaeda "terrorist  
9 warriors"?

10 A. That is, if you are referring to al Qaeda al Sulbah.

11 Q. Now al Qaeda has published fatwas against the United States  
12 going back as early as 1992; true?

13 A. Correct.

14 Q. Then again they declared war on the United States in 1996?

15 A. Yes.

16 Q. Fatwas to target civilians was issued in 1998?

17 A. Correct.

18 Q. After Ayman al-Zawaheri--I'm sorry, Muhammed Atef sent  
19 faxes to the al-Quds newspaper in London saying that they will target  
20 civilians?

21 A. Very correct. Yes.

22

23

1           Q.    The 1998 issue that's been dubbed, "The nuclear bomb of  
2   Islam," in which they say that it is the goal of al Qaeda to achieve  
3   weapons of mass destruction to terrorize the west.  Would you agree  
4   with that?

5           A.    Yes.

6           Q.    Now you testified that Darunta was a camp in which al Qaeda  
7   was seeking chemical biological weapons?

8           A.    That's correct, yes.

9           Q.    Aren't those weapons of mass destruction?

10          A.    In fact, I actually call them weapons of mass destruction,  
11   so I agree.

12          Q.    Most everybody does.

13          A.    Yes.

14          Q.    Do you also agree that they have carried out a number of  
15   these attacks against the United States?

16          A.    Yes, I do.

17          Q.    I would say that the "big five," the twin bombings in Kenya  
18   and Tanzania in 1998?

19          A.    Correct.  Yes.

20          Q.    There is no question anywhere that that was an al Qaeda  
21   operation?

22          A.    Not in my mind, no.

23

1 Q. The millennium bomb in 2000?

2 A. Yes.

3 Q. Fortunately we stopped it.

4 A. Attempt, right, yes.

5 Q. The Cole in 2000?

6 A. Yes.

7 Q. Of course, 9/11?

8 A. Correct.

9 Q. And Richard Reid, the shoe bomber, actually a couple months  
10 after 9/11?

11 A. Yes.

12 Q. Certainly an al Qaeda event?

13 A. Yes.

14 APROS: I am going to stop here. I am not going to go on  
15 further.

16 MJ: Very well.

17 CDC [Mr. Swift]: I have no redirect, Your Honor.

18 MJ: Very good. Thank you. Thank you for your testimony, sir.

19 **[The witness was excused and returned to his seat in the gallery.]**

20 MJ: Mr. Swift, I have another possibility. With respect to the  
21 witness that you were thinking of calling on the telephone, if this  
22 is an inconvenient time for you, then we might just proceed to your  
23 arguments on the motion. You and the trial counsel could call him

1 tomorrow morning or some other time with your interpreter, interview  
2 him on the phone, produce a stipulation of expected testimony, and I  
3 will let you submit that to me next week at my chambers and I'll hold  
4 open the resolution of this motion until I receive that, if you  
5 prefer that option.

6 PROS: No objection from the government, Your Honor.

7 CDC [Mr. Swift]: We prefer that option, Your Honor.

8 MJ: Fair enough. Four o'clock in the morning is early, no  
9 matter what part of the world you live in.

10 PROS: Fair enough.

11 MJ: If that works for the parties, that's an acceptable  
12 resolution to the court.

13 CDC [Mr. Swift]: With regards--I have one more exhibit that I'd  
14 like to offer and it would be the next appellate in order.

15 PROS: I can tell already. You don't even have to show it to  
16 me. It has a SECRET cover sheet on it. We haven't been given notice  
17 of classified documents. We don't have time to seek  
18 declassification.

19 CDC [Mr. Swift]: Actually, we don't need to seek  
20 declassification, Your Honor. Because I'm offering it for the  
21 defendant. I'm more familiar in these parts. He doesn't need to see  
22 it in this sense, or that it be open. The court contemplates the  
23 admission of secret evidence and this won't violate the rules. The

1 rules are quite clear only if the evidence is admitted against him  
2 must he see the evidence.

3 MJ: You have a secret document that the accused has not seen?

4 CDC [Mr. Swift]: Right. But I, as his counsel, have. I  
5 believe that it has some exculpatory evidence. I'm willing to offer  
6 it on his behalf and I don't believe that that violates the rules in  
7 that it's not evidence offered against him that would--my point on  
8 the pictures in the past was if it was being introduced by the trial  
9 counsel, we have a problem because the rules require him to see it.

10 Where I'm introducing it, it's not required that he be able  
11 to see it and, in fact, if one were to think about the deposition  
12 rules, there's no requirement that he be present there, that sort of  
13 thing. And if we count on whether we're offering evidence for the  
14 counsel it's for the attorney to do an adequate job. It's the  
15 evidence against him that he has the right to see so the client can  
16 understand.

17 MJ: So introduction of this document will not involve any  
18 disclosure----

19 CDC [Mr. Swift]: It requires no disclosure to the accused.

20 MJ: ----of classified evidence. It will be attached to the  
21 record of trial as a secret appendix, or something, and treated as a  
22 secret document.

1       PROS: Your Honor, I don't want to quibble with Mr. Swift. I  
2 would just direct Your Honor's attention to Military Commission Rule  
3 505g(1).

4       MJ: C(1)?

5       PROS: G(1), Your Honor. Golf-1. I don't see any "not showing  
6 to the accused" exception contained in that rule.

7       MJ: Okay, well here's what I'd like to do.

8       PROS: The rule clearly contemplates prior notice to the  
9 government.

10       CDC [Mr. Swift]: We received the document yesterday, sir, from  
11 the government for the first time.

12       MJ: Okay, once again, rather than resolve this now without  
13 having the government a chance to brief it, I will keep your offer  
14 open and give the government counsel a chance to look at the rules.  
15 You can argue about them off-line if you want, and submit a brief to  
16 the court.

17       PROS: Yes, sir.

18       MJ: If it turns out it's appropriate for me to consider it,  
19 then I'll consider it; if not, then I won't. I will actually be in  
20 the building tomorrow, so if counsel want to come by tomorrow and  
21 show me their briefs, leave, or not leave the exhibit, then the only  
22 thing that will be missing is an indication on the record of whether  
23 it was accepted or not and we can handle that at the next session.



1 Does that work?

2 PROS: Yes, sir.

3 MJ: Then you can look at your rules at your own leisure and  
4 think about whether or not this is something the government is  
5 comfortable with.

6 CDC [Mr. Swift]: I would also just point out----

7 MJ: Has that been marked in any way?

8 CDC [Mr. Swift]: I'm going to have it marked. They asked to  
9 see it at this point, Your Honor. I would also point out to the  
10 court that you're already considering one secret document that the  
11 accused has never seen. To this there was no problem back then.

12 MJ: I think you've caught the government by surprise and they  
13 deserve the chance to think about their response. I think we all  
14 want to be careful to make sure that we treat classified material  
15 properly.

16 CDC [Mr. Swift]: Certainly, Your Honor.

17 MJ: So I will reserve a ruling on the admissibility of that  
18 evidence until I've received your briefs and I will be here for a  
19 couple more days. So tomorrow morning there is time if you want to  
20 do that before you depart.

21 PROS: Thank you, sir.

22 CDC [Mr. Swift]: I'll have it marked as the next appellate  
23 exhibit----

1 MJ: Why don't you give it to the court reporter?

2 CDC [Mr. Swift]: ----and handled as secret and provide it to the  
3 court reporter.

4 MJ: And she will see safeguard it until we decide how to handle  
5 it.

6 **[The civilian defense counsel handed the document to the court  
7 reporter to be marked.]**

8 CDC [Mr. Swift]: Yes, Your Honor.

9 MJ: Okay and that concludes the defense's presentation of their  
10 evidence?

11 CDC [Mr. Swift]: It does, Your Honor.

12 MJ: Thank you. Trial Counsel, are you ready to argue the  
13 motion?

14 PROS: Your Honor, could I have just a brief stand in place  
15 recess and run upstairs and grab a note and be ready to go?

16 MJ: Yes, absolutely. Actually I would like to take a recess  
17 for 5 or 10 minutes. I have read all of your briefs. I have been  
18 thinking about this issue since June, so I will ask you to hit on the  
19 highlights of what you want me to understand and find both as to law  
20 and fact. So why don't we take a 10-minute recess and let you  
21 collect your thoughts, and then I'll return to hear your arguments.

22 Court's in recess.

23 **[The R.M.C. 803 session recessed at 2214, 6 December 2007.]**

1 [The R.M.C. 803 session was called to order at 2232, 6 December  
2 2007.]

3 MJ: Court's called to order.

4 Who's going to be arguing the motion for the government?

5 PROS: Your Honor, I will.

6 MJ: Alright, please go ahead.

7 PROS: Thank you, sir.

8 [The prosecutor moved to the podium.]

9 PROS: I would ask Your Honor for a time limit.

10 MJ: Two minutes.

11 PROS: Two minutes. I can do it. If you can give me 5?

12 CDC [Mr. McMillan]: I won't ask that question, Your Honor.

13 MJ: Thank you.

14 Go ahead and give me your argument.

15 PROS: All right, sir.

16 MJ: I want you to be able to argue your motion.

17 PROS: Yes, sir.

18 MJ: At the same time understanding that you don't have to start  
19 at square one with me.

20 PROS: Yes, sir. Understand.

21 I thank the court, counsel for the defense, and, of course,  
22 my colleagues at the government table. As we've gone through this  
23 process there are a couple of things that are certain this evening,

1 Your Honor, two of them: one it's late, we're tired; and that Mr.  
2 Hamdan squarely falls within the definition of an alien unlawful  
3 enemy combatant.

4 We start out, of course, with the M.C.A. section 948a, the  
5 definitional section. And the definition for "lawful enemy  
6 combatant" which we contend that the evidence has shown Mr. Hamdan is  
7 not; is number one, (2)(A): a member of the regular forces of the  
8 state party engaged in hostilities with the United States." Mr.  
9 Hamdan is not, nor was he ever a member of the regular forces, the  
10 state, or engaged in hostilities against the United States.

11 (2)(B): nor is he a member of a militia, a volunteer  
12 corps, organized resistance movement belonging to a state party  
13 engaged in such hostilities which are under a responsible command--  
14 responsible command wearing a fixed and distinctive sign recognizable  
15 at a distance carrying their arms openly and abiding by the law of  
16 war. Certainly not a member of a regular armed force and professes  
17 allegiance to a government engaged in hostilities but not recognized  
18 by the United States.

19 And, Your Honor, I understood that your preliminary ruling  
20 yesterday regarding the applicability and the requirement that we  
21 disprove certain elements of Article 4 of the Geneva Convention. And  
22 I'm going to address those as well because I believe that would be

1 dispositive of this motion. I'll address the facts briefly,  
2 conclude, and that will be the end of my presentation.

3 MJ: Commander [sic] Britt, I want to make sure you understand,  
4 I'm not tired and I don't want you to abbreviate your argument, you  
5 know, under the impression that I am----

6 PROS: I understand, sir.

7 MJ: Please give me your best argument.

8 PROS: All right, sir, I understand I appreciate the court's  
9 indulgence.

10 Criteria number four and I believe if I understand the  
11 defense's argument and the reference that they've made to the  
12 attempts that Mr. Hamdan has made previously to be recognized or  
13 disclaim POW status in federal court revolves around the section of  
14 the Geneva Convention Article 4 which states, "Persons who accompany  
15 the armed forces without actually being members thereof, such as  
16 civilian members, military aircraft crews, war correspondents, supply  
17 contractors, members of labor units, or the services responsible for  
18 the welfare of the armed forces."

19 Now, Your Honor, I think we can go through and quickly  
20 delete some of those subcategories. Certainly Mr. Hamdan has not  
21 claimed, nor has the evidence shown that he is a military aircraft  
22 crew member, that he is a war correspondent, that he is a supply  
23 contractor, a member of a labor unit or of services responsible for

1 the welfare of the armed forces, provided that he has received  
2 authorization from the armed force which he accompanies.

3 Your Honor, I would direct your attention to the next  
4 clause and the next clause says, "who shall provide them for that  
5 purpose with an identity card similar to the annexed model." Now we  
6 can handle that section very, very quickly. There was no identity  
7 card. There was evidence that there was a firearms carry card, but  
8 never an identity card that would comply with what we understand to  
9 be a Geneva identification card or the standard military  
10 identification. Certainly there's been no claim that under six, Mr.  
11 Hamdan was participating in or was a party to a levy en masse.

12 Now going back to criteria four which I indicated, Mr.  
13 Hamdan has tried to essential shoehorn himself into. This particular  
14 provision has been claimed by Mr. Hamdan I believe on the basis of  
15 evidence, that is, he was moving north on Highway 4 on the 24th of  
16 November 2001, he was supplying two SA-7 missiles to the resistance  
17 that was fighting and holding out against the coalition in Kandahar.

18 Your Honor, there are two competing theories as to what was  
19 going on there. He was driving north with the SA-7's, but what he  
20 was doing essentially was he was entering an area where information,  
21 where intelligence, where situation reports had indicated that al  
22 Qaeda was going to make its last stand. Now driving into that area  
23 with those SA-7's had delivery been made, then at that particular

1 point Mr. Hamdan is within the perimeter that--of that area he could  
2 rejoin with his al Qaeda colleagues, and he is essentially at that  
3 point, one of them.

4 I asked the question whether or not Mr. Hamdan was capable  
5 of fighting. We know from the evidence that he was trained to fight.  
6 He attended al Farouk, he received small arms training, combat  
7 training essentially the equivalent of our infantryman training. And  
8 we know that at that particular point having delivered the missiles  
9 unable to leave the perimeter albeit a loose perimeter, he would have  
10 become one of the group. Given his situation having pledged bayat to  
11 Usama bin Laden to fight to the end and fight unto the death.

12 So, essentially, he is not a supply delivery person for the  
13 welfare of the troops. He is also supplying his self to the fight,  
14 to the final glorious fight in Kandahar. So, essentially, his  
15 activity, though he may be seen as a person bringing supplies exceeds  
16 that because once the supplies are delivered he's then a combatant  
17 just like any other member of al Qaeda for the present he came from.

18 Now the evidence specifically shows, and we began our case  
19 with testimony from Major [REDACTED]. He led the combined Afghan and  
20 U.S. forces in the advance toward Kandahar through southern  
21 Afghanistan. And we heard through this testimony that not only did  
22 he lead this force, but for the purposes of this hearing he was the  
23 only eyewitness.

1           And Mr. Boujaadia testified to a portion of the events that  
2 occurred, but he was the only eyewitness that we have that was in a  
3 position to observe what occurred from the beginning, from the  
4 American arrival into the fight all the way through the battle of  
5 Kandahar. And what did Major [REDACTED] say? Major [REDACTED] said they were  
6 attacked by the Taliban. That the Taliban wore distinctive black  
7 headgear, miscellaneous gear underneath, miscellaneous tops and  
8 bottoms, no insignia, following the law of war, yes or no, who knows  
9 at that particular period. But we know there was combat. We know  
10 there was hostilities. We know there were those elements which  
11 satisfy the criteria for finding a person to be an alien unlawful  
12 enemy combatant.

13           We know that during the combat right in the middle of the  
14 time when 107 millimeter rockets are raining down on the position  
15 there we have Mr. Hamdan who comes driving through. And I don't  
16 think there's been any serious dispute about the fact that Mr. Hamdan  
17 was knowingly carrying two SA-7 surface to air missiles. Mr.  
18 Hamdan's vehicle was stopped. Mr. Hamdan was observed struggling as  
19 he was pulled away from that particular vehicle, and Mr. Hamdan  
20 ultimately was questioned by the American forces. And Your Honor has  
21 in evidence the video and the transcripts where Mr. Hamdan  
22 essentially said, "Yes, yes those missiles were in my vehicle." Now  
23 he said that the vehicle wasn't his, and he said the missiles weren't



1 his, but he said he knew they were there. He was driving those  
2 missiles back toward the fight.

3 I would submit to Your Honor that an individual who has  
4 been trained to be an infantryman, an individual who has weapons, an  
5 individual who has a permit that's required by the host government to  
6 carry those weapons, an individual clearly is not in any uniform no  
7 black headgear whatsoever, while 107 millimeter rockets are raining  
8 down upon the positions--and I believe in one of the pictures, Your  
9 Honor, it depicts the silver Toyota vehicle, you can also see in that  
10 photograph the identical explosions taking place in the background as  
11 with the other photograph that we placed in evidence. Now at that  
12 particular point, like I said he even said, "Yes, I knew they were  
13 there."

14 Now the tactical situation on the ground I think really,  
15 really needs to essentially as I've said define what Mr. Hamdan's  
16 intent was because he was passing north on the only--or at least the  
17 major north/south route and that would be Highway 4 heading north  
18 from Quetta through Takteh-Pol which was the village where this  
19 incident took place, and ultimately up into Kandahar where the combat  
20 continued.

21 We heard again Major [REDACTED] say that the individuals that  
22 they were fighting at first the Taliban and then al Qaeda were  
23 dressed in all different types of uniforms. He didn't necessarily

1 call them uniforms, clothing that would be more appropriate to the  
2 words that he used. They were wearing miscellaneous types of  
3 clothing; some wore camouflage bottoms, some wore camouflage tops,  
4 some wore no camouflage at all. Certainly not the type of uniform  
5 requirement that Geneva talks about. The only example that we have  
6 of any of the al Qaeda forces being dressed in uniform was for the  
7 interview, the CNN interview that the defense placed into evidence.

8 Now what's interesting about that particular video, Your  
9 Honor, is we see something that I think again affirms a point that I  
10 was making, and that is Mr. Hamdan does not fall into that Article 4,  
11 fourth part of the criteria. His--in that particular video he's not  
12 supplying anything. And I think from the position of Mr. Hamdan in  
13 reference to Usama bin Laden, one can safely conclude that what he  
14 was doing was escort Usama bin Laden or body-guarding Usama bin  
15 Laden. We didn't see in that video any evidence of any supplies  
16 being brought and delivered. You saw actions that were occurring  
17 outside of that fourth Geneva Convention point. Not a supply  
18 contractor, certainly not an individual with an ID card. I would  
19 submit a staged performance just like the USS COLE propaganda portion  
20 that was shown for the benefit of the public for training the  
21 Taliban/al Qaeda fighters as an organized and dedicated combat force.  
22 Certainly not what Major [REDACTED] encountered on the field of battle.

1           Now in a sense we can almost say that Mr. Hamdan was saved  
2 by Major [REDACTED] as he headed into that area to Kandahar, knowing what  
3 his intentions were with regard to the SA-7's and knowing what the  
4 ground situation was in Kandahar. But how do we know this, what  
5 other evidence do we have that this is true? He pledged conditional  
6 bayat to Usama bin Laden. He pledged bayat.

7           Now I know that the defense's expert didn't recognize that  
8 particular term, but, Your Honor, those were not the conclusions of  
9 the investigators--the government investigators. Those were the  
10 words of Mr. Hamdan himself. Mr. Hamdan told us during the course of  
11 that interrogation that, in fact, he had pledged that personal bayat,  
12 that loyalty, that degree of sacrifice that only the most committed  
13 members of al Qaeda pledge to Usama bin Laden.

14           During questioning by Lieutenant Commander Stone, we saw  
15 the summary of the unlawful, illegal, illegitimate, and horrible acts  
16 that had been committed against this country by al Qaeda; the head of  
17 al Qaeda, UBL, the bodyguard, the facilitator, the driver, the guard,  
18 the servant of UBL. That man right there **[points to the accused]**,  
19 right there and the defense is going to come before you in a minute  
20 and they're going to say, "No, no there shouldn't be a panel to sit  
21 over here in this box and hear this case. It ought to stop right  
22 here, because he wasn't a member of this kind of al Qaeda or he  
23 wasn't a member of that kind of al Qaeda, he was the wrong kind of al

1    Qaeda, he pledged the wrong kind of bayat." But I would submit to  
2    Your Honor that's not what the facts in this case show.

3               We have the al Fitr video clip what we showed briefly, and  
4    in the al Fitr video clip we see Mr. Hamdan again not delivering  
5    supplies, he is standing next to UBL with some type of long rifle.  
6    He is again providing that critical bodyguard function, not  
7    delivering supplies. We know that he was seen in that film  
8    cavorting, carrying on with the highest level members of al Qaeda.  
9    Your Honor, he was a member of "the club." He was a member of "the  
10   team," not a peripheral member, not on the side. We were shown two  
11   videos today. One by the government, one by the defense. There's  
12   Mr. Hamdan front and center with the mastermind of all those attacks  
13   against this country.

14             Special Agent [REDACTED] testified that after 9/11 after  
15   approximately 3,000 Americans died in our country Mr. Hamdan drove  
16   Usama bin Laden on a *circuitous* course throughout Afghanistan. Back  
17   and forth through the valleys, over the hills, to training camps, the  
18   cities, in an effort to help the emir elude the pursuing American  
19   forces; to hide him, to shield him, to perform the highest levels of  
20   his duty under bayat. UBL, the head. Hamdan, the real facilitator  
21   in this case.

22             Unlawful? Yes, sir. Directly supporting the leader of al  
23   Qaeda who's murdered thousands of Americans, attacks in violation of

1 the law of war. Alien? We've submitted an ICE form and a federal  
2 court affidavit where Mr. Hamdan admits to not being an American  
3 citizen. Enemy? He's engaging and facilitating operations against  
4 Americans domestic and deployed. And he's a combatant. He's a  
5 combatant. He fits the definition. He needs to sit right there  
6 while that group hears the evidence and decides. That's what this  
7 system is here for. They're the ones that need to judge that man's  
8 fate. Thank you.

9 MJ: Thank you, trial counsel.

10 CDC [Mr. McMillan]: Your Honor, my name is Joe McMillan, for  
11 the accused, Mr. Hamdan.

12 MJ: Thank you.

13 CDC [Mr. McMillan]: I'd like to invite the court to interrupt  
14 me at any time as I want to answer whatever questions the court may  
15 have. I've been thinking about this issue for seven or 8 months and  
16 want to move as quickly as possible to the showing that needs to be  
17 made by the government to establish personal jurisdiction under the  
18 M.C.A.

19 Displayed on the screen is the relevant statute defining an  
20 unlawful enemy combatant. Essentially there are four subparts that  
21 have to be shown. A person is an unlawful enemy combatant under the  
22 M.C.A. if he is engaged in hostilities or purposely and materially

1 supported hostilities against United States or its co-belligerents  
2 and is not a lawful enemy combatant.

3           The defense submits that the entirety of the case that has  
4 been put before the commission by the prosecution is a "guilt by  
5 association," case. It is an unlawful combatancy by association  
6 case because certainly individuals affiliated with al Qaeda, the al  
7 Qaeda al Sulbah, are unlawful combatants. Now the unrebutted  
8 testimony of our expert, Professor Williams, indicated--Your Honor,  
9 may I have a standing request to display the slides from my  
10 PowerPoint presentation?

11         MJ: Certainly.

12         CDC [Mr. McMillan]: None of which consists of new evidence  
13 they're simply text of the sort you see here.

14         MJ: Very well.

15         PROS: And we have no objection, Your Honor.

16         CDC [Mr. McMillan]: And likewise a standing request for the few  
17 items I'll put on the ELMO, which do have a number of highlighted  
18 sections of admitted exhibits and one or two demonstratives of the  
19 sort----

20         MJ: Please go ahead.

21         CDC [Mr. McMillan]: ----sort that I've generated over the  
22 break. And this I think sums up the theory of the case that we put  
23 before the commission and is supported with the testimony our expert

1 that al Qaeda is a term that has been bandied about very, very  
2 loosely, in the years following the attacks of September 11th. "Al  
3 Qaeda" has been used indiscriminately to refer to all non-Taliban  
4 fighters on the ground during the Afghan war. Al Qaeda has been used  
5 in a pell-mell and reckless fashion and it was our project to  
6 introduce some rigor and some precision into the way that language--  
7 the language is used.

8           Professor Williams testified that al Qaeda can  
9 appropriately and does accurately refer to at least two areas of  
10 activity. There are admittedly the so-called outside activities and  
11 the euphemism we see in some of the 302's, these outside activities  
12 are terrorist sleeper cells that the evidence indicated in this  
13 commission, Mr. Hamdan was not linked to. Not a shred of evidence  
14 linking Mr. Hamdan to either knowledge of their activities or  
15 participation of their activities, certainly not direct engagement in  
16 that kind of conduct and certainly no evidence concerning purposeful  
17 or material support of outside activities. He is not equipped to  
18 provide that kind of support. He doesn't have the language skills,  
19 the training, the facility and western culture that would allow him  
20 to integrate himself into a foreign land to conduct those kinds of  
21 operations.

22           Professor Williams testified that al Qaeda was also  
23 involved in another project, a project in country, in Afghanistan.

1   Why? Because of the Taliban. The Taliban represented a possibility  
2   to achieve an al Qaeda goal in the establishment of the caliphate.  
3   In the establishment of a land governed by Sharia and to do that was  
4   going to require conventional forces and it was going to require  
5   triumphing over the various Warlords that were known as the Northern  
6   Alliance.

7           The evidence that Professor Williams put before this court  
8   in the form of his expert testimony and in fact many of the Special  
9   Agents corroborated through their investigation was that al Qaeda  
10   through Usama bin Laden was supporting the Ansars. The 055 Brigade.  
11   The evidence unrefuted before this commission is that--is that  
12   fighting force is tightly integrated into the Taliban. The United  
13   States Secretary of Defense Donald Rumsfeld, in fact used the term,  
14   "tied at the waist." Al Qaeda was tied at the waist with the  
15   Taliban.

16           The evidence indicates that they were under responsible  
17   command, that they had a distinctive symbol, the battle flag, which  
18   was displayed before the commission. They carried arms openly and by  
19   in large in the Afghan theater of operations they conformed to the  
20   law of war.

21           Major [REDACTED] testified that these were tenacious and  
22   formidable foes. They carried communications equipment, instruments  
23   of command and control. They exhibited superior operational



1 coordination as a result of that capability. That is evidence of the  
2 kind of responsible command that is referred to under Article 4 of  
3 the Geneva Convention's.

4 Professor Williams testified that in many cases they were  
5 uniformed. They were certainly readily distinguishable from the  
6 civilian population. Indeed, there was testimony from the  
7 prosecution witnesses that the ATF, The Anti-Taliban Forces, had no  
8 trouble whatsoever distinguishing the Arab fighters based simply on  
9 that missing. The images put before the court by Professor Williams  
10 showed the elements of uniforms that would satisfy the requirements  
11 set out under Article 4. Well the evidence that predates 9/11, Your  
12 Honor, in the form of the videotapes of the al Fahrouk feast dating  
13 from approximately January of 2000. The CNN video dating from 1998,  
14 these predate the period of hostilities. These are irrelevant for  
15 the purposes of this inquiry.

16 If I may I'd like to move through some of the drill down as  
17 it were on some of the specific elements that are set up under the  
18 M.C.A. and just make sure that the court is fully apprised of the  
19 rigor that Congress used in defining this category of unlawful enemy  
20 combatants. Because this is not a standard that is easily met.  
21 Congresses intent was to limit the jurisdiction of this commission.  
22 The first two elements under the M.C.A. statute defining unlawful  
23 combatants are these: The person must be engaged in hostilities or

1 purposely and materially supporting hostilities. The defense  
2 position is that these two elements mean that the individual must be  
3 taking an active part in hostilities. This follows from a--from  
4 scrutiny of the M.C.A., from looking at the substantive offenses  
5 section of the M.C.A., we see that civilians not taking an active  
6 part in hostilities are defined as protected persons and attacking  
7 them is one of the crimes listed in the M.C.A. So it's very  
8 important that the court read the unlawful combatant statute to refer  
9 to those taking an active part in hostilities.

10           Now, the term hostilities is not defined in the M.C.A.  
11 It's not defined in the Geneva Convention. But clearly the  
12 overwhelming authority of--in international law, and commentators on  
13 the law of war, indicates that it refers to military operations  
14 within an armed conflict, a conflict in which armed forces are  
15 committed. It is not a reference to criminal activity outside a zone  
16 of armed conflict. Accordingly scattered terrorist attacks across  
17 the globe do not constitute hostilities and do not constitute armed  
18 conflict. Armed conflict is only present where armed forces are  
19 committed.

20           Now this slide shows a decision of the International  
21 Criminal Tribunal for Rwanda which is simply for definitional  
22 equating a term taking an active part with direct participation  
23 indicating that these phrases are virtually synonymous. And I wanted

1 to put that in there because the language and the commentary of  
2 Additional Protocol 1 of the Geneva Convention uses direct  
3 participation and it defines what is meant by direct participation.  
4 This quote is highly relevant to that question: "Direct  
5 participation in hostilities implies a direct causal relationship  
6 between the activity engaged in and the harm done to the enemy at a  
7 time and place where the activity takes place. That's direct  
8 engagement in hostilities. Civilians who do directly engage in  
9 hostilities lose their civilian immunity and become lawful targets  
10 under the law of war.

11 In direct participation in hostilities is not the criteria  
12 set up under the M.C.A. for unlawful combatant status. And here  
13 again we have a quote from the commentary to Additional Protocol 1 of  
14 The International Committee for the Red Cross indicating that,  
15 "logistical support such as transportation of arms and munitions,  
16 provisions of supplies, should only be considered in direct  
17 participation in hostilities." Now, there is an exception to that.  
18 And that's moving arms or weapons to firing positions on the  
19 battlefield. Civilians who are moving arms or weapons, many  
20 commentators will say they are engaged, directly engaged in  
21 hostilities and by the conduct become lawful targets.

22 Now the question is what was Mr. Hamdan doing? What has  
23 the evidence shown? He was moving north on Highway 4. There's

1 testimony that there were components, missile components, not ready  
2 to fire, but missile tubes and the missiles themselves without  
3 launcher units in a vehicle that Major [REDACTED]'s testimony was that  
4 some time after hearing them shooting, maybe 3 minutes, maybe 15  
5 minutes, he was able to get to the scene of the shooting. He was  
6 able, he said, and I wrote this down very carefully in my notes, "I  
7 had a few seconds look from 20 to 30 meters, he said, seeing a man  
8 being dragged away from a vehicle." A few seconds look from 20 to 30  
9 meters. He was then shown missiles in the vehicle.

10 Major [REDACTED] had a lot going on. Major [REDACTED] had bigger  
11 things to worry about then making sure the evidence was cataloged and  
12 properly associated with individuals. He was taking incoming fire.  
13 He had to organize the defense at that time. There is in evidence  
14 put before the commission suggesting that maybe there is some doubt  
15 about whether or not those missiles were in that car. The ARB report  
16 of Mr. Said who testified before us, I'll just display it here and  
17 the underlying passage, the ARB report indicated that the Afghan  
18 Opposition Forces troops took possession of two SA-7 missiles and an  
19 ICOM handheld radio from the Arabs killed in the gunfight. But,  
20 let's just for the purposes of this proceeding assume the missiles  
21 were in Mr. Hamdan's car. What would that be evidence of? Well, it  
22 could be evidence of civilian supply personnel moving north to supply

1 the last enemy stronghold in Afghanistan, Kandahar. Clearly Mr.  
2 Hamdan was surprised to run into a checkpoint at Takteh-Pol.

3 The prosecution suggested that he wasn't acting in a supply  
4 capacity. He wasn't a civilian supply person. In fact, he was a  
5 fighter himself supplying himself as personnel to the battlefield.  
6 Is that what the evidence really shows? The evidence shows on the  
7 contrary. There were several Arab individuals who were stopped at  
8 that checkpoint who jumped out and opened fire or attempted to  
9 detonate grenades. And essentially consistent with the sort  
10 testimony we've heard about the ferocity and commitment of these  
11 fighters essentially took on odds that could not be overcome. I mean  
12 essentially it was suicide operations at that checkpoint. But that  
13 was not Mr. Hamdan's response.

14 Now, even if he had attempted to do that all that we would  
15 have then is that Mr. Hamdan was perhaps himself a member of Ansars  
16 or the 055 Brigade. Even if he was in possession of those missiles  
17 and he did attempt to use them in combat, all that would establish is  
18 that he was moving into a battle zone to engage in combat using those  
19 weapons. And it's entirely reasonable to conclude and indeed the  
20 evidence that has been put forward here in no way undercuts the  
21 position that Ansar 055 Brigade was a lawful enemy combat unit under  
22 Article 4. The most the prosecution has been able to come forward  
23 with is that Mr. Hamdan was not properly uniformed.

1           Well, when you look at Article 4 there are a few things  
2 that you need to call to mind. First of all, if he is engaging in  
3 supply operations then there is not a uniform requirement. But let's  
4 assume that he is in fact a fighter himself in this which case  
5 subpart A2 of Article 4 of the Geneva Conventions becomes relevant.  
6 That is a member of a militia or other volunteer corps belonging to a  
7 party to the conflict these members can themselves be prisoners of  
8 war provided that those militias or volunteer corps has fulfilled the  
9 following four conditions, and these are the four conditions that the  
10 court is well aware of, under responsible command, how do you fix a  
11 distinctive symbol, carrying arms openly, conducting operations in  
12 accordance with the law of war.

13           There's two points I think here. One is that Mr. Hamdan  
14 did not believe himself to be moving into a position where he'd be in  
15 contact with the enemy. And a fighter who is surprised in a place  
16 that he believes is distant from the front does not have to wear his  
17 uniform all the time. If he's captured behind the lines are in some  
18 remote location where he does not expect to be engaged in contact  
19 with the enemy and is out of uniform is not therefore an unlawful  
20 combatant.

21           The other point is that his lawful combatancy is  
22 predicated on his membership in a unit that satisfies those four  
23 conditions. There's not a requirement that the individual himself in

1 all times and in all cases satisfy those four requirements. The unit  
2 must generally satisfy those four requirements. So even if Mr.  
3 Hamdan is one of the 055 Brigade, Ansars, and if that's what the  
4 evidence the court chooses to believe then the court has before it  
5 un rebutted testimony from Professor Williams that that brigade in  
6 fact met those four conditions. And that the prosecution's  
7 proposition of Mr. Hamdan's membership in that unit would therefore  
8 not disqualify him under that subpart.

9           Now, let me switch back to some of the elements that are  
10 set out in the M.C.A. statutory definitions. One is unlawful  
11 combatant if he's engaged hostilities, or if he purposely and  
12 materially supports hostilities. That's a very high standard.  
13 Purpose is specific intent. It is a *mens rea* standard beyond mere  
14 knowledge. And material support means the support must be direct and  
15 substantial not merely incidental. The M.C.A. does not define  
16 purposeful but you can look to some of the decisions for example of  
17 The United States Supreme Court to define what purposeful means. The  
18 Supreme Court said, "A person who causes a particular result is said  
19 to act purposefully if he consciously desires that result."

20           There's been not one shred of evidence to suggest that Mr.  
21 Hamdan consciously desired any of the terrorist atrocities that the  
22 al Qaeda al Sulbah has been guilty of. The Model Penal Code likewise  
23 sets a very high standard for purposefully conduct one well beyond

1 the knowledge. The Model Penal Code says, "A person acts  
2 purposefully with respect to a material element of an offense when if  
3 the element involves the nature of misconduct or result thereof it is  
4 his conscious object to engage in conduct of that nature which had  
5 caused such a result, a conscious object to cause a particular  
6 result."

7 Now even if things like the COLE attack or the Embassy  
8 bombing's of 1998, events that predate the hostilities, even if those  
9 are taken as taken as incidents in an ongoing war between the United  
10 States and al Qaeda, there's not been one piece of evidence  
11 introduced to show that Mr. Hamdan purposefully intended to support  
12 that activity. There has been rather testimony that he knew about it  
13 after the fact. He figured it out through his association and maybe,  
14 well it looks like they were involved. That's not the standard that  
15 the statute sets up.

16 Material support, well the M.C.A. doesn't define material  
17 support either; however, one might look for guidance of other U.S.  
18 statutes. The statutes cited here are material support for terrorism  
19 and they do mention things like weapons and transportation. It maybe  
20 that Mr. Hamdan, if he was moving missiles to a battlefield, to a  
21 firing position, if he was moving active operative missiles to a  
22 firing position, could be materially supporting that conflict. But,  
23 that conflict would be in support of a lawful unit, the Ansars.



1 That's not--there's no suggestion that those missiles were destined  
2 for operations outside of that particular conventional war.

3           The third requirement is that the activity, that the  
4 hostilities be directed against United States or its co-belligerents.  
5 Belligerency means during the period of armed conflict. The period  
6 of armed conflict that is relevant is the one initiated by 9/11  
7 resulting in the AUMF, the authorization for the use of military  
8 force, the commitment of American Armed Forces in a resolution of  
9 congress dating from September 18th 2001. U.S. cobelligerents, well,  
10 one can only be a cobelligerent of the United States sometime after  
11 the AUMF, sometime in the fall of 2001.

12           We have already talked about some of these slides relating  
13 to the Geneva Convention. The court has taken under advisement a  
14 request for an Article 5 hearing. Let me dwell for a moment on this  
15 slide to note that the prosecution looks to the Afghan war for  
16 certain jurisdictional facts but it ignores it for the purposes of  
17 the Geneva Convention. In fact, I was struck by the testimony of  
18 Professor Williams that the head of the Northern Alliance himself,  
19 Mr. Rabbani, the head of the Northern Alliance, as reported by the  
20 BBC, in the midst of the battle in November of 2001, promise Geneva  
21 Convention protections. Not just to the Taliban but to the  
22 foreigners who were fighting alongside the Taliban. So are

1 cobelligerents were recognizing as lawful combatants the Ansars that  
2 are being so cavalierly described as al Qaeda terrorist's.

3           As far as the uniforms it may not have been--the Ansars may  
4 not have been a kind of uniformed force that we'd see in the forces  
5 of North American or Western European forces but for Professor  
6 Williams testified that there were news reports indicating that Arab  
7 fighters did have uniforms and here's one from the Christian Science  
8 Monitor again during the war itself, "Arab fighters in fresh new  
9 uniforms scramble through the doors in shops in Kabul as U.S. jets  
10 screamed overhead." Another one, "In Kabul Arab fighters are more  
11 visible than ever switch from wearing traditional Afghan clothing to  
12 new green and black Commando Uniforms. These foreign fighters  
13 estimated at from 5,000 to 15,000 in total form what western military  
14 experts call the sharp end of the Taliban and fighting forces."

15           Indeed, Your Honor, in light of the testimony of Professor  
16 Williams today, I think the commission needs to carefully consider  
17 whether POW status may not be available under subpart A1, which says,  
18 "members--prisoner of war status is afforded to members of the armed  
19 forces of a party to the conflict as well as members of militias or  
20 volunteer corps formed in part of such armed forces."

21           Let me--let me just display that here. Subpart 1 refers to  
22 militias or volunteer corps formed in part of such armed forces.  
23 Militia and volunteer corps appear again in the same Article in

1 subpart 2, but this time there's the added requirement of the four  
2 criteria. A requirement that is not present in the first subpart.  
3 Now were the Ansars, the 055 Brigade, integrated tightly enough into  
4 the Taliban forces to form part of that armed force? Well Jane's  
5 World Armies seemed to think so in a publication dating from August  
6 of 2001. "The foreigners are better further integrated into the  
7 military machine of their Afghan hosts than ever was the case before,  
8 constituting between a fifth and a quarter of total Taliban combat  
9 strength and in recent times frequently spearheading offensive  
10 operations foreign units have become an indispensable element of the  
11 Taliban order of battle."

12           If that's not a description of a militia or volunteer corps  
13 formed in part of the armed forces, I don't know what is. And indeed  
14 the designation of the 055 Brigade is itself a numeric designation of  
15 an Afghan regimental unit. So, in sum, Your Honor, the evidence that  
16 has been put before the court in no way creates a preponderance of  
17 evidence as showing that the four requirements of the M.C.A. have  
18 been satisfied. In fact at best Mr. Hamdan has been linked to the  
19 activity of the Ansars. Whether he's supplying them or whether he is  
20 himself on a member of them, it doesn't matter. What the evidence  
21 shows is that the Ansars were a lawful combat unit and accordingly as  
22 a member of that unit under the best case of what the prosecution  
23 showed, Mr. Hamdan would be entitled to POW status.

1           Now let me close with an issue that was raised in the  
2 briefing, and I just want to call to the court's attention, and I  
3 don't want to say a lot about it, but it relates to the standard of  
4 proof that needs to be shown. And it was dealt with in the last  
5 brief submitted to the court prior to our hearing here this week that  
6 was the briefing on the Article 5 motion. And what I have on the  
7 projector here is a highlighted section of the CMCR's decision in  
8 United States v. Khadr from September. And there is a statement here  
9 indicating that the burden of raising the special defense that one is  
10 entitled to lawful combatant immunity rests upon the individual  
11 asserting the claim, in this case Mr. Hamdan, who has asserted that  
12 claim. Once raised the burden shifts to the prosecution to prove  
13 beyond a reasonable doubt that the defense does not exist.

14           Determining--well, the position of the prosecution is  
15 that's an affirmative defense that we'll deal with at the trial on  
16 the merits. And their position is that at the trial on the merits  
17 they acknowledge that they'll have to prove beyond a reasonable doubt  
18 that no combatant immunity under the GPW exists. The defense posits,  
19 Your Honor, that this is in fact a threshold determination. A  
20 Jurisdictional determination not unlike the kind of immunity  
21 determination's that would protect someone from jurisdiction and  
22 trial in the first place like prosecutorial immunity, suing someone

1 who in the exercise of his government operations or government  
2 activities is immune from that suit.

3 Just like the M.C.A. itself says this commission does not  
4 have jurisdiction over lawful combatants and to try such an  
5 individual would be a violation of the Geneva Convention. There's  
6 further evidence that this should be considered as a threshold matter by  
7 the commission at the start in this final sentence: "Determining  
8 lawful and unlawful combatants status under existing international  
9 treaties, customary international law, case law precedents both  
10 international and domestic and the M.C.A., is a matter well within  
11 the professional capacity of a military judge." This is a legal  
12 question, a threshold question for a pretrial hearing for this  
13 commission to decide at the threshold. That's the defense's  
14 position. I understand that there's some obscurity with respect to  
15 that paragraph but we think it makes most sense that this standard be  
16 shown when the issue of immunity is first raised, which is now. And  
17 it's analogous to the kind of immunity that one receives on a double  
18 jeopardy claim or a prosecutorial immunity situation on a motion to  
19 dismiss. You deal with it right at the start.

20 If there are any questions, Your Honor, let me say on the  
21 equal protection arguments we'll stand on our briefing. We do  
22 believe the M.C.A. in applying this legal regime to aliens and not to  
23 citizens is unconstitutional in that it violates the equal protection

1 clause of the United States but I don't want to go through that  
2 issue. The court does not need to reach that issue and in fact under  
3 a doctrine of constitutional avoidance the court should look to other  
4 grounds rather than constitutional grounds to resolve the questions  
5 in front of it. Nevertheless there is a very serious equal  
6 protection violation setup by the M.C.A. as indeed there's a very  
7 serious constitutional question raised by the section of the statute  
8 that the court brought to the attention of the parties yesterday in  
9 stating--where the M.C.A. states that an unlawful enemy combatant  
10 cannot invoke the protections of the Geneva Conventions.

11 I stated the defenses position on that but that's only  
12 after there's been a finding of unlawful enemy combatancy. But one  
13 needs to think that in this case there is a holding of the United  
14 States Supreme Court that the Geneva Convention does protect Mr.  
15 Hamdan. At least Article 3 of the Geneva Convention and no act of  
16 Congress can strip him. That would be a breach of the separation of  
17 powers that is beyond the capacity of Congress to strip from Mr.  
18 Hamdan at this point.

19 So there are serious constitutional questions that would be  
20 raised by denying Geneva Convention protections or equal protections  
21 of the law that the court need not breach. If there are any  
22 questions, I'd be happy to address them.

23 MJ: What exactly do you claim your client's status is?

1 CDC [Mr. McMillan]: We believe our client is a prisoner of war.

2 MJ: Based on what section?

3 CDC [Mr. McMillan]: Protected at least under A4, possibly under

4 A2 and A1. Bear in mind Your Honor----

5 MJ: I didn't bring my copy of the Geneva Conventions. A4 is

6 what?

7 CDC [Mr. McMillan]: Let me put those in front of you. Okay, A4

8 at the very bottom of the screen are the civilian support personnel.

9 Members of Labor Unions----

10 MJ: You don't need to read it. I'll read A4 later; I just

11 wanted to ask what your claim is.

12 CDC [Mr. McMillan]: That is one claim. Now bear in mind we

13 haven't put on evidence of this yet in the form of testimony from our

14 client.

15 MJ: Sure.

16 CDC [Mr. McMillan]: We have invoked these protections, however,

17 and the evidence that's been put by the government in fact supports

18 them. It does not undercut them in any way. The evidence that's

19 been introduced specifically is absolutely consistent absolutely with

20 Mr. Hamdan falling into that category, but if the evidence of the

21 prosecution at its best is accepted *in toto* concerning the missiles

22 and the inferences that the prosecution asks the government to accept

1 our accepted then Mr. Hamdan would fall under A2 and be protected as  
2 a member of the militia which satisfies those four criteria.

3 And we would also posit that based on Professor Williams'  
4 testimony the integrated nature of the Ansar and the 055 Brigade into  
5 the Taliban forces would offer--would afford Mr. Hamdan protection  
6 under A1.

7 MJ: Thank you very much.

8 CDC [Mr. McMillan]: Thank you.

9 PROS: Very brief?

10 MJ: No, I don't need anymore argument from the government,  
11 thank you very much. It's not that I don't need a brief one; it's  
12 just that I don't need one.

13 PROS: Yes, sir, thanks.

14 MJ: I fully understand your positions. Before we recess I  
15 would like to talk about the schedule for future sessions which I  
16 wanted to draft in the event that this motion goes in the  
17 government's favor this time. I haven't got that done and I'm not  
18 prepared to discuss it with you tonight so I'll simply send something  
19 out and you can respond to it as you will. The other issue of  
20 discovery, one of the members of the defense team indicated that a  
21 discovery request was filed in May which has not been responded to.  
22 So I'd like to have the trial counsel indicate what's going on with  
23 discovery.



1       APROS: Yes, sir, we've actually turned over about 2300 pages of  
2 documents from 2003 through 2004, et cetera. We probably will be able  
3 to complete the last part of what was asked for in maybe three weeks.

4       MJ: Okay, are there any parts of the defense's requested  
5 discovery that you intend to deny or are you simply collecting  
6 documents and giving them everything they asked for.

7       APROS: Well partly its collecting documents and then its  
8 working through some of those issues to make sure that we can comply  
9 with the things that they want in the manner in which we need to do  
10 so.

11       MJ: Well I'll expect discovery to be complete within a few  
12 weeks then.

13       APROS: Absolutely, we'll inform the court.

14       MJ: And I'll hear from the defense if they're dissatisfied with  
15 the government's response to your request.

16       CDC [Mr. Swift]: Yes, Your Honor. In that same vein, because  
17 we really have a discovery issue pending in a motion before the  
18 court, and that's the access to the high value detainees. We regret  
19 in this process on the springing of witnesses at the last second. We  
20 were really trying to comply, but the rules are new. So we took the  
21 date of the court and we don't want to find ourselves in that  
22 position where someone's denied because it's untimely again. So, the  
23 faster we can have our access, or find out what our access will be to

1   conduct investigations, the faster we're going to be able to conduct  
2   this process if the court were to determine that we're going to go  
3   forward under this regime. The most difficult place to be in deciding  
4   who your witnesses are or you want to call is that's very hard to do  
5   until you completed your discovery and talked to all of these people.  
6   It's an ongoing process.

7         MJ:   Okay.

8         CDC [Mr. Swift]:   So the faster we find out whether we're going  
9   to be able to talk to these people in the CITF and it sounds like  
10   there are a lot of clearance requirements we're going to have to  
11   comply with to get that done.   The faster we know that we would get  
12   access the faster we'll be complying with those things and moving it  
13   along.

14        MJ:   I appreciate that, but that motion is one the government  
15   indicated yesterday on the record they probably won't be able to  
16   respond to this time in Guantanamo Bay.   So, I'll ask the government  
17   to figure out what the rules might be about accessing those witnesses  
18   and if we need to take that motion up at our next session, if we have  
19   a next session, its been filed with the court.   The government can  
20   respond in writing and we'll consider that ready.

21           Now, I appreciate you bringing up the issue of untimely  
22   motions, because the logistical effort that goes into a session here  
23   means that a lot of advance planning has to happen and it's just

1 impossible to litigate witness production requests after we're  
2 already here most of the time. So, for future sessions, perhaps I'll  
3 set a date by which motions have to be filed and if they're not filed  
4 by that date then we'll treat them as not having been filed even  
5 though we're here in court and they were later filed or something  
6 like that. I appreciate your expression of desire to not be in this  
7 position again.

8 I think that's everything that we need to discuss before we  
9 adjourn for this session. I'll expect counsel to come by tomorrow  
10 morning to brief me on the secret document that was offered but not  
11 yet admitted and to offer a stipulation of expected testimony if that  
12 works out.

13 Anything else, Lieutenant Colonel Britt, you want to raise?

14 PROS: Sir, I have just an 802 housekeeping measure if one  
15 member of the defense would come forward. We can just do this right  
16 there or go back to your office. I think it's very, very, simple.  
17 It's not something necessarily on the record.

18 MJ: Okay.

19 CDC [Mr. Swift]: Your Honor, understanding the morning part, my  
20 take on the stipulation that we had within the next week to get that  
21 done. It's a lot----

22 MJ: Oh yes, I assumed you would want to call them while both of  
23 you were here with the interpreter handy.

1 CDC [Mr. Swift]: We are going to start trying as it's harder  
2 from here. Yes.

3 MJ: And that means tomorrow morning, but if you need a few more  
4 days to put it together then I'll hold open the resolution of the  
5 motion a few days. I won't be back to my office until next week in  
6 any event.

7 Okay, the court's adjourned.

8 **[The R.M.C. 803 session recessed at 2336, 6 December 2007.]**

9 **[END OF PAGE]**